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CONVEYANCER'S NOTEBOOK

POST-1939 LETTINGS AND THE REPAIRS INCREASE

Mr. G. R. G. Johnson has raised an interesting point on the construction of section 23 of the Housing Repairs and Rents Act, 1954, the section giving authority for the repairs increase in respect of rent-restricted premises. It has generally been assumed that the section does not apply where the first letting is post-1939. Subsection (3) provides that the section shall not apply if " (a) the standard rent of the dwelling-house is such as is mentioned in paragraph (a) or (b) of subsection (1) of section one of the [Landlord and Tenant (Rent Control) Act, 1949] (which relates to standard rents fixed by reference to lettings beginning after the first day of September, nineteen hundred and thirty-nine)." To ascertain what is excluded from section 23, we have to turn to the 1949 Act, s. 1, which reads: " (1) Where apart from this section the standard rent of a dwelling-house would be—

(a) the rent at which it was let on a letting beginning after the first day of September, nineteen hundred and thirty-nine, or

(b) an amount ascertainable by apportionment of the rent at which a property of which it formed part was let on such a letting as aforesaid . . ."

In either of these cases an application may be made to a Rent Tribunal to determine the reasonable rent, and, by subsection (2) as amended, if the rent so determined differs from what would be the standard rent apart from the section " it shall, as from the date of the determination thereof, be the standard rent of the dwelling-house."

Mr. Johnson points out that, if there is an application to a Tribunal and the Tribunal determines the reasonable rent at a figure higher or lower than the contractual rent, the rent so determined

becomes the standard rent, which is no longer a rent "as is mentioned in paragraph (a) or (b)" of the 1949 Act, s. 1 (1). Accordingly, in such a case it would appear that the landlord can apply for the repairs increase. As the landlord himself can apply to the Rent Tribunal, if he can obtain any variation from the contractual rent he will be able to get the repairs increase.

Mr. Johnson views this result with alarm and would like to learn the views of our subscribers. It is certainly odd, but we cannot trace that the point has so far been considered by any court. Although Mr. Johnson's argument seems logical we feel that the courts will struggle to avoid his construction. We would be very interested to know whether anyone has come across the point in practice.

STAMPING AFTER EXECUTION—NEW TIME LIMITS

In the *Law Society's Gazette* for April there is a note that, as a result of representations from the Council, the Commissioners of Inland Revenue, in exercise of their powers under the Stamp Act, 1891, s. 15 (3) (b), have extended the time limit for the stamping of the following instruments from 14 days after execution to 30 days: agreements under hand only (liable to a fixed duty of 6d.); agreements for letting furnished houses or furnished apartments for a term less than a year, or any duplicate or counterpart thereof; and leases, and agreements for leases, for any definite term not exceeding a year, of any dwelling-house or part of a dwelling-house at a rent not exceeding the rate of £40 per annum, or any duplicate or counterpart thereof. This assimilation of practice is most satisfactory.

While on the subject of stamping, we wonder whether London practitioners are aware of the Post Office facilities for stamping. Provincial solicitors for years have lodged their documents at the Post Office and collected them in due course. These facilities are just as much available to London solicitors. We mention the point as, recently, at Bush House, there were no fewer than 60 persons queueing at the markers. The Post Office has three advantages: (i) if the queue is long, it is often quite simple to return later, which is often not the case at Bush House; (ii) the Post Office does not close at 4 o'clock; and (iii) the practitioner can dispense with the "Particulars Delivered" form, and possibly plan, under the Finance Act, 1931.

ADDITIONAL INQUIRIES—LONDON COUNTY COUNCIL

A form for use when making additional inquiries of the London County Council has at last been agreed between the Law Society

and the Council and came into operation on April 1. The new form, known as Con.29E, can be obtained from the Solicitors' Law Stationery Society Ltd. The fees are 7s. for one parcel of land and 1s. 6d. for each additional parcel (where contiguous), with a maximum of 28s.

Rent Restrictions Regulations, 1956

We draw attention to the Rent Restrictions Regulations, 1956 (S.I. 1956, No. 257), which prescribe forms to be used for the purposes of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 12. It will be recollected that this section deals with the position where there is an " appeal " against the assessment of rent-restricted premises and the landlord serves a notice of increase: the tenant can either pay the increase or pay at the old rate and in either event have the matter adjusted when the appeal is determined. If the prescribed form is not served with the notice of increase the notice is invalid. (The section is noted in Vol. 19, at p. 371.)

As a result of the new assessments in some cases landlords find themselves better off. For example, if the standard rent is fixed by reference to a letting, say, in 1950, the landlord paying rates, it may be that the rates now payable are less than in 1950, but the tenant is not entitled to a reduction in rent, for there is nothing in the Rent Restrictions Acts requiring a reduction below the standard rent except in the case of a transfer of burden (*cf. Strickland* v. *Palmer* [1924] 2 K.B. 572).

We were recently asked what happens where a rent-restricted tenant appeals against the new assessment, opts to pay rates at the old rate under section 12 referred to above and then disappears, and in due course the assessment is upheld so that additional rates are due, but we think readers can work this one out for themselves.

Control of Borrowing (Amendment) Order, 1956

For some considerable time practitioners have only had to consider control of borrowing in relation to fairly substantial transactions, but the Control of Borrowing (Amendment) Order, 1956 (S.I. 1956, No. 358), by reducing the annual limit from £50,000 to £10,000 has changed all this. Building finance has, as a result, become difficult, cumbersome and frustrating. It is true that ordinary bank borrowing is unaffected, but private building for letting is made well nigh impossible. The government seems hardly consistent in its policy for, at the same time as it makes the Order, the Housing Subsidies Act, 1956, is passed, which is intended to

speed up slum clearance and would be expected to result in leaving ordinary housing to private enterprise. No attempt has been made to limit or restrict the simple expedient of forming company after company, each borrowing £10,000 per annum.

SOLICITOR ACTING FOR VENDOR AND PURCHASER

Danckwerts J. in *Goody* v. *Baring* [1956] 1 W.L.R. 448, at p. 450 (noted *post*, p. 239), emphasised the difficulties in the way of a solicitor who acts for both vendor and purchaser. He expressed the view that it was practically impossible for a solicitor to do his duty to each client properly and adopted a very strongly worded passage from the judgment of Scrutton L.J. in *Moody* v. *Cox* [1917] 2 Ch. 71, at p. 91. Although acting for both vendor and purchaser is not often very satisfactory, there seems little doubt that there is nothing improper in doing so. One difficulty that so often arises is that the clients often expect a reduction in costs and the Law Society has quite properly set its face against this practice. The Divisional Court in *Re Evill* [1951] 2 T.L.R. 265 pointed out that where a solicitor acted for two parties—in that case purchaser and mortgagee—he did the work for both parties and owed a duty to both, but it did not suggest that there was any impropriety merely in acting for both. Another difficulty that causes acute embarrassment is where one party wishes to withdraw and the other wishes to go on. With respect, however, it does not seem correct, as Scrutton L.J. stated, that a solicitor may be placed in a position where he must be liable to one party or the other, whatever he does. If, during the course of a transaction, a solicitor's position becomes impossible, surely he has a right to explain to both clients that he must withdraw from acting for either party. After all, a similar state of affairs can arise if a solicitor acts for two clients in totally unrelated matters and he discovers facts about one client which materially affect the other.

The whole judgment in *Goody* v. *Baring* deserves careful consideration, but it does not appear that any very useful purpose would be served by barring solicitors from acting for both parties in all cases. So long as the possibility of a conflict of interest arising is borne in mind and the temptation of carrying on when the conflict has arisen resisted, there would seem to be no objection to a continuation of what is now a well-established practice in appropriate cases.

FORM 3, P. 668

Some subscribers appear to have had some difficulty in appreciating the object of Form 3, at p. 668 of this volume. The

Form is intended to apply to cases where the testator desires the fund to be divisible between all the children of the life tenants *per capita*, a class which cannot be ascertained until the death of the last life tenant. If the children take *per stirpes* no difficulty arises as they take the one-third which their parents had for life and duty is payable only on this one-third.

The Form makes the children of the life tenants take the shares of income which their parents had, in right of their defeasible shares of capital until the death of the last life tenant, when their shares will be varied so as to secure equality between all the children *per capita*. If the will provided that the shares of income payable to the first two life tenants to die were to continue to be payable after their deaths to their respective children, and that the capital was to vest in all the children on the death of the last survivor of the life tenants, new interests would arise in all the children on his death and estate duty would be payable on the whole fund under section 2 (1) (b) of the Finance Act, 1894. Duty will of course be payable on the one-third of the fund on the deaths of each of the two first life tenants to die whichever form of trust is adopted. But under the above Form duty will only be payable on the death of the last life tenant in respect of the fractions of the shares accruing to, or passing from, the children.

Thus, in the case contemplated by Form 3, if D leaves two children, E two children, and F three children, each child of D will, until the death of F, have one-sixth, each child of E one-sixth and each child of F one-ninth. On the death of F each of the 7 children will take one-seventh. The shares of the children of D will each be reduced by one-sixth minus one-seventh, and those of the children of E by one-sixth minus one-seventh. Thus on F's death the fund will pass to the extent only of F's one-third plus four forty-seconds (one-sixth minus one-seventh), *viz.*, nine twenty-firsts instead of the whole, and duty will be saved to this extent. The principle of *Adamson* v. *Att.-Gen.* [1933] A.C. 257 applies to the proportion of the shares remaining vested in the children. No claim of course could arise under section 2 (1) (d) of the Finance Act, 1894, as the death is not that of the Settlor. By a printer's error, lines 12 and 13 on p. 671 have been transposed.

COAST PROTECTION CHARGES

By M. J. Russell, ll.b., Solicitor

> "In less enlightened days, King Canute, when faced with coast protection work, approached the problem simply by sitting on the beach and demonstrating, quite shortly, that the sea could not be kept out. Sir, in these more enlightened days, we approach the problem by demonstrating that the sea can be kept out, thereafter sitting down and arguing at great length as to who is going to pay the cost of keeping the sea out."

Thus did Mr. Mattar begin his final speech during the hearing before the Lands Tribunal of the first references to be made under the Coast Protection Act, 1949, and at the end of last year the Lands Tribunal gave their decision (*a*). The Folkestone Corporation had built a new sea wall at Sandgate, pursuant to a works scheme made under the 1949 Act, and they levied coast protection charges on various owners of land adjacent to the sea. Many of the owners appealed to the Lands Tribunal and certain references were selected as test cases, the hearing of which lasted fifteen days. The Act provides that the charge should represent the increase in the value of the owner's land as a result of the coast protection works carried out, and the Tribunal's observations on the method of calculating this increase will be fully discussed later in this article. By way of introduction, it is proposed to glance back at the history of the financial aspect of coast protection, in order to demonstrate that the "betterment" provisions of the recent Act are not altogether new in this sphere.

Historical Review—Winchelsea

Incursions of the sea have always been a problem in this crowded island, and the earliest efforts to deal with the problem can best be studied if attention is focused on one particular town. Winchelsea, in Sussex, is the obvious choice, for its inhabitants were fighting a vigorous but losing battle against the inroads of the sea during the thirteenth century. As early as 1244, the king

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(*a*) *Holborn Trust Co. Ltd.* v. *Folkestone Corporation* (1956) 6 P. & C.R. 86. Some comments have already been made on the Tribunal's decision in [1956] J.P.L. 170 by Mr. Salt, who, as Deputy Town Clerk of Folkestone, is well qualified to discuss the Act as it affects coast protection authorities.

considered that a quay should be built "for the defence and improvement" of the town, and to pay for it he authorised the barons of Winchelsea to take (for a limited period) 2s. from every ship that entered the port carrying a certain quantity of wine (*b*). In 1248, the king made a grant for the town's preservation of up to £30 out of the issues of Winchelsea and Rye (*c*); but this was insufficient, for in the following year the custody of those two towns was granted to the barons for a year at a much larger sum (£86 13s. 4d.) on various conditions, one of which was that they would be "diligent in repairing and preserving the town against the sea" (*d*).

All this expenditure was in vain, for in 1250 the town was struck by a fierce storm (*e*), and shortly afterwards the king ordered an inquiry to discover how the town could be saved from the sea (*f*). Another great storm in January, 1252, caused further damage (*g*), and the barons were then ordered to appoint twelve townsmen to advise what aid would be required to protect the town against the sea (*h*). Whatever advice was proffered, further financial assistance was needed some ten years later "because of the imminent peril from the waves and the violence of the sea, which constantly threatens the town"; a grant of murage for seven years was therefore made to the barons so that they might provide "obstacles against such peril and floods" (*i*). This grant, which gave the barons power to levy a local rate, was extended for further periods (*k*).

The sea defences were being constantly strengthened, one instance being the grant by the king to one Horne, a townsman of Winchelsea, of a piece of land measuring 100ft. × 50ft. and lying between Horne's house and the harbour for the express purpose of enabling Horne to build a quay for the protection of his own house against inundation by the sea (*l*). Yet by 1280 it had become clear that no amount of expenditure could save the old town, which was for the most part submerged; the king's steward was therefore ordered to buy or obtain by exchange land at nearby Iham Hill (*m*), and in the following year three eminent assessors were appointed to let plots of land at Iham to the

(*b*) [1244] *Pat.Rolls*, 427; [1245] *ibid.*, 454.
(*c*) [1248] *Liberate Rolls*, 198.
(*d*) [1249] *Pat.Rolls*, 39.
(*e*) Mat.Paris, *Chron.*, R.S., 57,v,176.
(*f*) [1251] *Pat.Rolls*, 90.
(*g*) Mat.Paris, *op. cit.*, 272.
(*h*) [1252] *Close Rolls*, 91.
(*i*) [1262] *Pat.Rolls*, 226.
(*k*) [1269] *ibid.*, 357; [1295] *ibid.*, 147; [1321] *ibid.*, 14.
(*l*) [1276] *ibid.*, 151.
(*m*) [1280] *ibid.*, 414.

barons and townsmen of Winchelsea for building purposes (*n*). Another commission of three was given powers similar to our present-day development corporations, in that it was appointed to plan the lay-out of the new town of Winchelsea. Most of the inhabitants were moved, and the "relocation" of the township was completed by a grant to the barons confirming that they should enjoy the same customs and privileges as in the old town (*o*). If the move had been delayed, the result might have been disastrous, for the old town was finally destroyed by another storm in 1288 (*p*).

The construction of the new town led to no relaxation in the crown's efforts to supervise effective sea defences. The town itself was secure enough on its hill, but the surrounding marshes were still in danger of inundation. An inquisition in 1300 gave the names of those holding land in the marsh of Winchelsea and also the names of certain of their tenants who "ought to defend the said lands and their free tenements by walls and dykes, when necessary, from inundation of the sea, because their tenures well suffice for that purpose" (*q*). But it was a different story some three years later, when the same commissioners reported that "the marsh of Winchelsea cannot be saved by the old wall existing towards the east, but a new wall 350 rods in length should be made before Hokeday next up to high-water mark. The said new wall cannot be made by the lands which used to keep the old walls according to the ancient composition, because they are insufficient for the purpose on account of their diminution and on account of the roughness of the sea daily overflowing them, unless the king's and other lands, which may have safety by the new wall, contribute equally thereto." Even so, they added, sixty acres of land would remain exposed outside the new wall (*r*). The day after the inquisition was held, and before he had seen the commissioners' report, the king agreed to contribute towards all necessary repairs according to the amount of his own land in the marsh, for he had learned independently that the walls and ditches had been so damaged by the sea that all the land in the area (including his own) was likely to be inundated, unless the walls and ditches were speedily repaired. The king's own tenants had refused to contribute towards the heavy cost of the repairs because of an agreement made between them and the other tenants of the marsh throwing the burden on the latter: this was the "ancient composition" referred to in the commissioners' report. The king

(*n*) [1281] *ibid.*, 3.
(*o*) [1283] *ibid.*, 81. See also [1288] *Close Rolls*, 509; and *Fine Rolls*, i, 249.
(*p*) *Gervase Cant.*, R.S., 73, ii, 293.
(*q*) *Cal.Inq.Misc.*, i, No. 1820.
(*r*) *Ibid.*, No. 1911.

stressed that his contribution was to be regarded as an *ex gratia* payment and that the other tenants were not thereby exempted from making their own proper contributions (*s*). A few weeks later, after the king had seen the inquisition, he amplified his earlier order to provide that the amount of contribution due from himself and the other tenants should be fixed by the commissioners or their representative (*t*). Despite the king's contribution, some of the other tenants were still unable or unwilling to pay and drove their cattle away from the Winchelsea marsh to avoid distraint, whereupon the king ordered distraint of their land wherever situated (*u*).

Although Winchelsea continued to suffer from the encroachments of the sea (*a*), the worst had passed. Eventually, the sea receded, leaving the new port high and dry. But the sixty odd years of the town's history that have been described serve as a remarkable illustration of the different ways in which the expense of coast protection works was met many centuries ago. Perhaps the illustration is not typical, for the king had a considerable interest in Winchelsea, not only because it was a flourishing port, but also because he himself was the immediate lord of much of the land near by. Nowhere else, however, was the sea such a constant menace, requiring frequent and concerted action to keep it at bay. The following methods of paying for sea defences have been illustrated:

(i) A levy on ships (to build a quay only).
(ii) Direct grants from the crown of money or land.
(iii) Local rates paid by the townsmen.
(vi) Contributions from adjoining landowners, the liability arising as a result of express agreement, local custom, or tenure (*b*), or simply as a result of increased protection for an owner's property.

The first method was clearly an exceptional case, and it may

(*s*) [1303] *Close Rolls*, 60.
(*t*) *Ibid.*, 114.
(*u*) [1305] *Pat.Rolls*, 324.
(*a*) See [1363] *ibid.*, 352.
(*b*) Care must be taken to distinguish the service of guarding the coast *from the king's enemies*. One writer (in 177 L.T. 106, reprinted as App. C to Lemmon on *Public Rights in the Seashore*) cites the following entry in S.S. Vol. 49, 155 (1293): "William of Kirkby and Christiana his wife hold the hundred of Stowting at fee farm of the lord king for 20s. by the year finding 6 men for *seaward* when it shall be necessary." He assumes that "seaward" is defence against the sea, but an earlier entry, in *Cal.Inq.*, i, No. 389 (1257), shows that this is incorrect: "Stowting hundred, held of the king in chief by service of 20s. yearly, and of 6 men and a constable to guard the passage of the sea, if necessary, on account of the king's enemies at Sandgate." Some 700 years later, the sea is indeed the enemy at Sandgate, as the recent test cases have shown, and nearby Stowting will contribute towards its defence through the county rate.

have had no connection with defence from the sea. The other three methods still prevail (*c*), and in particular the "betterment" provisions of the 1949 Act are foreshadowed by the suggestion in the inquisition of 1303 that proportionate contributions should be made by the owners of land to be benefited by the works. Although the king exercised close supervision over coast protection and sometimes provided financial assistance, he did not regard himself as primarily responsible. Most of the cost had to be met locally, and not on a national level. The same principle remains today.

Common law rules

The common law rules, as they finally emerged, can be shortly stated. Despite the crown's supervisory powers, a landowner cannot compel the crown to carry out coast protection works (*d*); nor can an owner himself be compelled to carry out work for the protection of his neighbour's land, unless he is bound to do so by tenure, custom or express agreement (*e*). But he must not remove a natural barrier to the sea, if by so doing he would endanger his neighbour's land (*f*), and if he interferes with a sea wall already built he must keep it up to the level of the rest of the wall (*g*). The duties of an individual landowner were, therefore, largely of a negative character, unless the crown was forced to make some kind of co-ordinated scheme for a badly affected area.

Statutory reform

An Act of 1427 (*h*), which was amplified and extended at various times (*i*), prescribed a form for commissions of sewers. These commissions were no innovation, but had been issued for some 200 years before their form was regulated by this statute. In origin, they were inquisitions of the kind to which reference has already been made. The statutory form recites the damage, orders the commissioners to survey and inquire of the jurors who is at fault and who holds lands in the vicinity or "may have defence, profit and protection, near or afar, from the said walls, *etc.*" They are to be distrained, in accordance with the extent of their lands, to repair as necessary. The statute repeats that none that receives any benefit should be spared. A new form

(*c*) See §§ 7, 20 and 21 of the 1949 Act.
(*d*) *Att.-Gen.* v. *Tomline* (1880) 14 Ch.D. 58 (C.A.).
(*e*) *Hudson* v. *Tabor* (1877) 2 Q.B.D. 290 (C.A.).
(*f*) *Symes* v. *Essex Rivers Catchment Board* [1937] 1 K.B. 548 (C.A.).
(*g*) *Nitro-Phosphate* v. *London Docks* (1878) 9 Ch.D. 503 (C.A.).
(*h*) 6 Hen. 6, c. 5.
(*i*) 8 Hen. 6, c. 3; 18 Hen. 6, c. 10; 23 Hen. 6, c. 8; 12 Edw. 4, c. 6; 4 Hen. 7, c. 1; 6 Hen. 8, c. 10.

of commission was prescribed in 1531, but it was merely an extended version of the 1427 formula (*k*).

The Commisioners of Sewers continued to function until 1930, although a lengthy Sewers Act in 1833 had attempted to modernise the system. Various local Acts laid down their own rules for payment (*l*). The Land Drainage Act, 1930, which repealed the 1531 and 1833 statutes, did not relate directly to sea works, but it was an implied principle of the Act that it was the duty of the relevant Drainage Board to keep out sea water, as well as to control the flow of inland waters (*m*). After a Coast Protection Act in 1939, which simply gave the Board of Trade power to prohibit dangerous excavations, it was left to the Coast Protection Act, 1949, to establish a complete code for sea defence works, and to provide for the levying of coast protection charges (*n*).

1949 Act

Let us now turn to the financial provisions of the Coast Protection Act, 1949, so far as they affect owners whose land is near the sea. A works scheme prepared by a coast protection authority under section 6 may indicate land in respect of which coast protection charges are to be payable under the scheme on the ground that the land will be benefited by the carrying out of the work, and such land is described as "contributory land" (*o*). Coast protection charges are levied by reference to the different interests (freehold or leasehold) in the contributory land, although there is nothing to prevent various interests being assessed with no charge (*p*).

The method of calculating the maximum charge is governed by section 7 (3):

> The coast protection charge payable by reference to any such interest shall not exceed the amount by which the value of the interest immediately after the time at which the works provided for by the scheme have been completed, calculated

(*k*) 23 Hen. 8, c. 5, made perpetual by 3 & 4 Edw. 6, c. 8. "This certainly appears to contain the germ of the principle of betterment."—Final Report of the Uthwatt Committee on *Compensation and Betterment* (1942), Cmd. 6386, p. 106.

(*l*) *e.g.*, Newhaven & Seaford Sea Defences Act, 1898, s. 40 (specific proportions and fixed sums for named owners and councils); Local Government Board's Provisional Order Confirmation (No. 15) Act, 1913, Sched., art. 18 ("sea defence rates"); and more recently, Newhaven, etc., Act, 1947, Part IV (cost of maintenance).

(*m*) *Symes* v. *Essex Rivers Catchment Board*, *supra*, at p. 572, *per* Scott L.J.

(*n*) The preamble modestly begins: "An Act to amend the law relating to the protection of the coast of Great Britain against erosion and encroachment by the sea . . ." (*o*) s. 7 (1).

(*p*) s. 7 (2). It is suggested that a freeholder cannot pass his charge on to a lessee, whatever the terms of the lease.

on the assumption that those works will in future be maintained without expense to the person entitled to the interest in question, is greater than the value of that interest would then be if the works had not been undertaken.

There is a proviso allowing the charge to be reduced if any of the work provided for by the scheme is carried out at the expense of owner.

A person aggrieved by the charge so assessed has two rights of appeal:

(i) to the Lands Tribunal (*q*), and

(ii) (unless the amount of the charge was specified in the scheme) to the Minister of Housing and Local Government.

The Lands Tribunal is concerned solely with questions of value arising from the proper interpretation of the Act, whilst the Minister has a complete discretion to reduce or cancel the charge if he considers that it is "inequitable or unduly onerous" (*r*). If an owner intends to exhaust both rights of appeal, he will normally appeal to the Tribunal first, although a reference to the Tribunal is not a condition precedent to an appeal to the Minister.

The Tribunal's Formula

It is clear from the Tribunal's decision in the recent test cases that there is no need to calculate the capital value of the land when assessing coast protection charges. The Tribunal took the view that, in ascertaining the proper charges, "only two factors need be considered:—

(1) Such enhancement of value (we term it betterment) as results from

(a) relief from all future maintenance of the sea defences,

(b) relief from the risk of complete failure of the sea wall with its attendant danger and expense.

(2) Such reduction of value as results from the construction of the works, whether it be loss of privacy or the physical effects of an alteration in the form of the sea defences" (*s*).

The Tribunal's formula deserves close attention.

1. Betterment

(a) *Relief from future maintenance*

Section 7 (3) provides that the calculation must be made on the assumption that the scheme works will in future be maintained

(*q*) ss. 7 (7) and 24 (1).
(*r*) s. 7 (6).
(*s*) (1956) 6 P. & C.R., at p. 97.

without expense to the owner (*t*). If the owner has not previously been in any way responsible for the periodical maintenance of the sea defences—such as an owner where land does not directly abut onto the sea—this assumption will only be relevant to the Tribunal's second item of "relief," inasmuch as the owner is not relieved from any maintenance costs, whilst the scheme works will be a greater protection to all concerned if properly maintained. But the Tribunal's first item of "relief" becomes relevant when an owner is directly absolved from maintaining some portion of the sea defences, which are included in a works scheme. Where the owner's land includes a sea wall, he may not be under any legal obligation to maintain it, as we have seen, but for the protection of his own property he will obviously try to keep the wall in good repair. The scheme may provide for the complete rebuilding of the wall, and in this event the statutory assumption will result in a reasonably straightforward mathematical calculation by which the estimated annual cost of maintaining the *old* wall will be capitalised. Since the assumption is that the new wall will be maintained without expense to the owner, his relief from future maintenance costs must take into account his estimated expenditure on the old wall, which would often be larger than the cost of maintaining a new wall. The fact that the new wall is bigger and better than the old one does not affect the owner under this head. In the test cases, the Tribunal accepted the figure of 15s. a foot as the estimated annual cost of maintaining an old wall, the life of which was not expected to exceed five years according to the expert engineering evidence; but this figure will vary from place to place, depending on such varied matters as condition and type of the wall and groynes, nature of the beach, shelter, proximity to the sea, prevailing winds and tides.

If the old sea wall was in such a state of decay as to require immediate rebuilding, the cost of this will be reflected in the charge, but in this case the Tribunal regarded it as reasonable to treat the future maintenance of such a new wall as an element of "the risk" from which the owner was relieved, and thus not directly to debit the owner with the capitalised maintenance charges. If this had not been done, the coast protection charge might have been so high as to imply that the pre-scheme value of the owner's property was a minus quantity.

Difficulties arise if the scheme works supplement, but do not replace, the existing sea defences, and here it is respectfully suggested that the Tribunal's general reference to "sea defences"

(*t*) See also s. 15.

in the first item of their formula is too wide. The statutory assumption refers only to maintenance of the scheme works, and these will not necessarily include all the sea defences. In the cases before the Tribunal, substantial emergency works had been carried out before the works scheme; these works included steel sheet piling at the base of the sea wall and the construction of a new set of groynes. Although some of the emergency work, such as the steel sheet piling was later physically incorporated into the scheme works, it could not be treated as part of the scheme works for the purposes of section 7 (3). Under section 13 of the Act, the coast protection authority had quite distinct rights of recovery against the owners in respect of the emergency works, and those works "enured to the benefit of the frontagers whether the latter had made any contribution under section 13 or not." Yet, after agreeing at the beginning of their decision that none of the emergency works was included in the scheme for the purposes of section 7 (3), the Tribunal later treated the future maintenance of the groynes as a factor to be taken into account, although these groynes had not been provided for by the scheme.

If, therefore, the old wall is not rebuilt, but is engulfed by the scheme works, the statutory assumption will only relate to the added portion, although future maintenance of the added portion will (in the absence of serious damage) make it unnecessary to maintain the old wall (*u*). The whole wall will doubtless be compulsorily acquired by the authority and become its sole responsibility (although the Tribunal thought that there would be no *duty* imposed on the authority to maintain non-scheme works); but these valuations under section 7 (3) are based on theoretical facts, and it is thought that an owner's responsibility for the old wall on the facts mentioned above must be regarded as continuing in theory.

(b) *Relief from risk*

More important than relief from future maintenance is relief from the risk of complete failure of the existing sea defences, and this risk may be present even if the property concerned is itself directly protected by an adequate sea wall, because there is still the danger of a flank attack. Under the previous heading, we have only been concerned with the sea defences for which a landowner has been directly responsible. But the historical review above has emphasised that co-ordination of effort is essential for successful coast defence, and under the present heading the coast

(*u*) The Act distinguishes between "works provided for by the scheme" in s. 7 (3), and "works constructed, altered or improved under a works scheme" in ss. 13 (1) and 15 (1).

protection charge can reflect the benefit accruing to any owner from a co-ordinated scheme of defence.

The statutory assumption (that the scheme works will be maintained without expense to the owner) applies to all the works provided for by the scheme, so long as they are capable of benefiting the relevant land, and thus affords a greater degree of relief. The risk of the sea defences' failing can never be completely removed, but unless the completion of the scheme works substantially diminishes that risk, the object of the scheme will have been frustrated.

It is suggested that the statutory assumption can be construed as imposing a duty on the authority to maintain the scheme works, so that owners suffering damage as a result of neglect of that duty will have a right of action against the authority. But, as mentioned above, this duty will not extend to sea defence works outside the scheme, although it would be folly for an authority not to maintain essential defence works for which no one could be made responsible.

2. Injurious affection

Valuations under section 7 (3) must have reference to market values (*a*), and therefore all matters resulting in a reduction of value are relevant, regardless of whether they could form the basis of a claim for damages on their own. The sub-heading " injurious affection " should not be regarded as limiting the considerations that are relevant.

In the cases recently before the Tribunal, the new sea wall included a promenade, or " maintenance gangway " as the authority preferred to call it, and the owners complained of loss of privacy as a result. The Tribunal reached the conclusion that " the two largely incalculable factors, freedom from risk and loss of privacy, would generally speaking balance one another, subject to some adjustment in specific cases." It is clear that in some cases there will be no loss of privacy, if the new sea wall does not include a promenade that was not there before, and in other cases there will be only slight relief from risk, if the existing sea defences were in a good condition in relation to a particular property. But in cases where freedom from risk and loss of privacy do in fact balance one another, the coast protection charge will simply reflect relief from future maintenance of the scheme works.

Finally, the Tribunal refer to a possible reduction of value as a result of the physical effects of an alteration in the form of

(*a*) s. 24 (2) incorporates the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, rules 2 to 4.

the sea defences. Here they have in mind such matters as an alteration in the shape or position of a sea wall, causing greater flooding or vibration of adjoining property than before.

The Tribunal mentioned no other instance of injurious affection that should be taken into account when assessing coast protection charges. Ingenious valuers may try to discover other heads of supposed reduction in value, but for practical purposes the Tribunal's instances appear to be almost exhaustive. In some cases, a good sea view may be lost; in others, direct access to the beach may be lost, but it is thought that the authority will usually ensure that owners are granted adequate rights. In the test cases, the model conveyance of the land being acquired by the authority granted rights of way over the sea wall, provided for the erection of davits, and prevented the authority from using the promenade for some of the incidental purposes allowed by section 22 of the Act.

Section 19 claims

If the injurious affection resulting from the works scheme exceeds the betterment, no coast protection charge will be payable, and the owner will turn to section 19 of the 1949 Act to discover whether he has any claim against the coast protection authority. Section 19 (1) provides:—

> Where on a claim being made under this section it is shown—
>
> (a) that the value of an interest of any person in land has been depreciated, or that any person has suffered damage by being disturbed in his enjoyment of land, in consequence of the carrying out of coast protection work by a coast protection authority in the exercise of the powers conferred by [Part I] of this Act . . .
>
> the coast protection authority shall pay to that person compensation equal to the amount of the depreciation or damage:
>
> Provided that a person shall not be entitled to compensation under paragraph (a) of this subsection unless the act or omission causing the depreciation or disturbance would have been actionable at his suit if it had been done or omitted otherwise than in the exercise of statutory powers.

An owner can recover under this section only in respect of such disturbance or such depreciation in the value of his property as would normally give rise to an action in tort (probably nuisance) against the authority. The limitation prescribed by the proviso is similar to the rule that excludes claims for pure injurious affection under section 68 of the Land Clauses Act, 1845, unless actionable at

common law (*damnum absque injuria*) (*b*). Claims for injurious affection are not limited in this manner if some of the claimant's land is compulsorily acquired and used for a purpose that might give rise to a claim. The only anomaly is thus perpetuated, with the result that the amount of compensation payable to an owner may depend on whether the authority need to acquire some of his land for the new sea defence works or not. If there is a chance of injurious affection exceeding betterment, an owner should not agree too readily to a nominal figure as compensation for compulsory acquisition.

The proviso may exclude residual claims for compensation in respect of matters that were relevant in assessing the section 7 charge, such as loss of privacy. But on the other hand, section 19 does not relate only to works carried out under a scheme. It will be observed that there is no assumption about future maintenance such as is contained in section 7 (3); nevertheless, if we are correct in treating the section 7 assumption as imposing a duty on the authority to maintain the scheme works, the same assumption must be made for the purposes of section 19. The very object of coast protection work is such that there will be few cases where a successful claim for depreciation under section 19 can be made.

Summary

In conclusion, perhaps we may restate the Tribunal's formula by suggesting that a valuation made after the completion of a works scheme under the Coast Protection Act, 1949, should assess any increase or decrease in the value of the appropriate interest as a result of the carrying out of the scheme works (assuming that they will be properly maintained) by taking into account, on the *credit* side—

(i) any extra protection from the sea, and
(ii) any relief from the burden of maintaining those works in the future;

and on the *debit* side—

(i) any extra risk from the sea, and
(ii) any incidental reduction of value through loss of amenity (*c*).

(*b*) *Metropolitan Board of Works* v. *McCarthy* (1874) L.R. 7 H.L. 243; *Caledonian Ry.* v. *Walkers' Trustees* (1882) 7 App.Cas. 259 (both H.L.).

(*c*) Subject to the application of the proviso to s. 19 (1) (a) if the debit exceeds the credit, as mentioned above.

HEARINGS BEFORE THE CHIEF LAND REGISTRAR

(A Lecture delivered at King's College, London, by
Sir George H. Curtis, c.b.)

I was extremely honoured but rather overwhelmed at being invited by the Academic Council to deliver a Special University Lecture because I understand that these invitations are only made to persons outstanding in various branches of the law and I have never thought of myself as coming within that category. However, after some cogitation it seemed to me that I could, in all modesty, claim to have a special knowledge of the subject of hearings, if only because for the last nine years I have been intimately concerned with all matters or disputes which might lead to a hearing and have presided over all hearings that have taken place. I was further influenced in my selection of the subject by the fact that the number of hearings is on the increase and I find that the practice and procedure are not very well known either to counsel or to solicitors.

Origin of Jurisdiction

The Chief Land Registrar's jurisdiction to hear and determine questions and disputes and to make orders is a child of statute law. If I may continue the metaphor, the mother was the Land Transfer Act, 1875, and the father the Report of the Royal Commissioners appointed to inquire into what their warrant of appointment euphemistically described as the " operation " of the Land Registry Act of 1862. The truth was that the 1862 Act had failed to operate and the Commissioners came to the conclusion that one of the reasons for this failure was that the Chief Land Registrar had to refer all disputes to the court and had no power to decide them himself. Therefore in their Report, which was published in 1870, they recommended that the Chief Land Registrar should be given power to summon parties before him and decide disputes, and the Land Transfer Act, 1875, which created the system of land registration we have today, adopted this recommendation. It may or may not be significant, I cannot say, that although the land registration system has been vigorously attacked and criticised from time to time practically the only feature of the system which has been spared is this jurisdiction of the Chief Land Registrar. I hope that nothing I shall say today will put an end to this immunity.

Being, as I say, a child of statute law the scope and operation of the Chief Land Registrar's jurisdiction must be looked for in the relevant statutory provisions. These are now the Land Registration Act, 1925, and the Land Registration Rules, 1925, the Rules having the same force and effect as if they had been enacted in the Act itself. So far as the Act is concerned there is no neat fasciculus of sections where the Chief Land Registrar's judicial powers are conveniently set out. To ascertain what they are the whole Act must be read because they are contained in a number of sections scattered throughout it. For example, section 13 authorises the Chief Land Registrar to hear and determine objections to applications for first registration and section 17 gives him power to award costs. Section 75 empowers the Chief Land Registrar to deal with claims arising under the Limitation Acts and sections 82 and 83 with rectification of the register and indemnity and under section 128 he can summon witnesses and order the production of documents.

Present Jurisdiction

I am afraid parliamentary draftsmen have no regard for the convenience of students when they draft Acts of Parliament but in this case the Land Registration Rules of 1925 come to the rescue because they set out the Chief Land Registrar's judicial powers concisely and comprehensively in one Rule. This is Rule 298 and it is so important that I hope you will forgive me if I read it to you in full:—

> Rule 298 (1). If any question, doubt, dispute, difficulty or complaint arises before the Registrar upon any application or during any investigation of title—
>
> (a) as to the registration of a title, incumbrance or charge,
>
> (b) as to any dealing with any registered title, incumbrance or charge or any matter entered or noted in or omitted from the register, or
>
> (c) as to the amendment or withdrawal from the register or production to the Registrar of any certificate or other document, or
>
> (d) in any registration or other proceeding in the Registry, or
>
> (e) as to any claim for indemnity
>
> (whether such questions relate to the construction, validity or effect of any instrument, or the persons interested, or the nature or extent of their respective interests or powers, or as to the order of priority or the mode in which any entry should be

made or dealt with in the register or otherwise) the Registrar shall hear and determine the matter and, subject to appeal to the Court, make such order in the matter as he shall think just.

I pause here to mention two points on this part of the Rule which are of importance. The first is that under the terms of the Rule the Chief Land Registrar can only adjudicate on questions which arise on applications for registration, *e.g.*, applications to register dealings or applications for first registration or applications to rectify the register. That is why, even where the decision may turn on the fact that the title to the land is registered, it does not necessarily follow that the case comes before the Chief Land Registrar in the first instance or at all. An example is the case of the *City Permanent Building Society* v. *Miller* [1952] 1 Ch. 840 where the decision turned on the fact that an agreement for a three years' tenancy was not an overriding interest under section 70 of the Land Registration Act, 1925, and could not prevail against a subsequently registered charge because it had not been protected by entry of notice on the register. Registration of title was also an important consideration in the line of Irish company cases which concluded with the recent decision of the House of Lords in the case of *Att.-Gen.* v. *Parsons* [1956] 2 W.L.R. 153, that a transfer of land into mortmain did not work an immediate and automatic forfeiture to the Crown. One short passage in Earl Jowitt's speech which appears on p. 160 illustrates this. He said: "There can be no doubt that the provisions contained in section 23 [of the Land Registration Act, 1925] are express provisions relating to a disposition for valuable consideration. I should have been inclined to construe them as affecting the right of Her Majesty to forfeiture in such a case as this." But, as it was held that there was no automatic forefeiture, the point was not pursued. This limitation on the sphere of the Chief Land Registrar's jurisdiction explains why many kinds of proceedings both contentious and non-contentious, where the fact that the title to the land involved is registered is merely incidental, do not come before the Chief Land Registrar but are dealt with by the courts in the ordinary way. Examples of such proceedings are actions for specific performance and application to discharge or modify restrictive covenants or to appoint new trustees of a settlement. In all such cases where the court makes an order, if the title to the land is registered, an office copy is served on the Chief Land Registrar who gives effect to it by making a suitable entry on the register. In so doing he is, of course, acting in a ministerial and not in a judicial capacity.

The second point to which I should like to draw your attention is that in those cases which come before him the Chief Land

Registrar's jurisdiction is not limited, as is that of the county courts, by the value or nature of the property concerned and it extends to registered land throughout England and Wales. I do not think it is an exaggeration to say that the Chief Land Registrar's judicial powers in the field in which they operate appear to be as unrestricted as those of a judge of the High Court.

Reference to High Court

To resume my reading of Rule 298 after this rather lengthy pause—the second part of the Rule goes on to provide that "the Registrar may, if he thinks fit, instead of deciding the question himself, refer the matter at any stage, or any question thereon, for the decision of the Court." This provision is not intended as an escape clause for a harassed Chief Land Registrar but to provide him with the means for ensuring that cases involving important principles will be heard by a judge of the Chancery Division and receive adequate publicity by being reported in the legal press and the *Law Reports*. The way in which this provision operates is that the Chief Land Registrar makes an order directing the applicant to refer the matter to the court and the applicant in compliance with the order institutes an action by means of an originating summons in the Chancery Division of the High Court under Rule 6 of Order 54D of the Rules of the Supreme Court.

Re Chowood

This procedure has not often been employed and so far as I can trace there have been only three references to the court since 1925. In each of these cases the principle involved appears to me to have been sufficiently important to have fully justified bringing the matter before the High Court but, as two of the orders of reference were made by me, I hope I am not biased in the view I take. The first of these cases was the well-known one of *Re Chowood's Registered Land* [1933] 1 Ch. 574, where the facts were that a company called Chowood Ltd. were registered as proprietors of certain land which they had bought but which included some strips of woodland to which without their knowledge an adjoining owner named Lyall had acquired title by possession. The register had been rectified by excluding Lyall's strips of land and Chowood Ltd. claimed compensation on account of this. The claim was referred to the court in the way I have described because it involved deciding the effect of the grant of an absolute title and whether rectification of the register to give effect to overriding interests entitled the registered proprietor to claim compensation. The case

came before Clauson J. (as he then was) who held that the rectification of the register merely recognised the existing position and put Chowood Ltd. in no worse position than they were in before. In these circumstances he decided that Chowood Ltd. had suffered no loss by reason of the rectification of the register and had no valid claim to indemnity under section 83 of the Land Registration Act, 1925.

Re No. 12, Regent Street

The second case was *Re No. 12 Regent Street, Oxford* [1948] 1 Ch. 735, where the Chief Land Registrar refused to register a transfer of property to an Oxford college on the ground that the transfer would be void if it was not recorded with the Minister of Education under section 87 of the Education Act, 1944. As the college refused to send the transfer or a copy to the Minister on the ground that the provision of the Education Act did not apply to them the Chief Land Registrar ordered the question to be referred to the court. The court upheld the Chief Land Registrar's contention and as a result of this decision the provisions of section 87 have been very greatly relaxed by section 15 of the Education (Miscellaneous Provisions) Act, 1953, and now no longer apply to a local education authority, a university, a university college or a college of a university—a subtle distinction which I am confident you will appreciate. The change is undoubtedly for the better and I expect the cynics are saying " Good will out even in a registered title."

Re 139 Deptford High Street

The third case was *Re 139, Deptford High Street* [1951] 1 Ch. 884, where the correct interpretation of subsection (3) of section 82 of the Land Registration Act, 1925, was in question. This is the subsection which provides that where the registered proprietor is in possession the register shall not be rectified against him except in certain special circumstances and is, of course, of great importance in the land registration system.

In all these cases the Chief Land Registrar ordered the matter to be referred to the court instead of hearing it himself and although the Rule provides that he may refer the matter or any question arising on it to the court at any stage of the proceedings it seems to me that once a hearing has begun the circumstances must be very exceptional that would justify the Chief Land Registrar in breaking off the hearing and referring the matter to the court instead of giving a decision himself and leaving it to the parties to appeal if they thought fit.

Disputes arising out of Cautions

It might be thought that the terms of Rule 298 were sufficiently comprehensive to embrace every kind of dispute but because of the importance of cautions in the land registration scheme of things specific provisions for dealing with disputes arising out of cautions are contained in both the Act and the Rules. In the Act the sections are 54, 55 and 56 and in the Rules the Rules are 215 to 222. As you know, registration of a caution is the means by which someone who claims an interest in registered land adverse to that of the registered proprietor can protect his interest. Examples of the kinds of interest which can be protected in this way are the rights of judgment creditors, equitable mortgages and contracts for the purchase of land and the protection afforded is that the Chief Land Registrar will not register any dealing with the land by the registered proprietor without first notifying the cautioner and giving him fourteen days within which to object. As it might be highly inconvenient or unjust for the registered proprietor to have to wait until he disposed of the property before he could challenge the caution it is provided that he may at any time request the Chief Land Registrar to serve notice on the cautioner warning off the caution and this notice compels the cautioner to appear and defend his caution or submit to its being cancelled on the register.

If the cautioner objects to the cancellation of the caution he must support his objection by showing cause why it should continue on the register or why the proposed dealing with the land should not be registered—as, for instance, that it has been obtained by fraud or mistake or is inconsistent with a prior dealing or some adverse right which would not be overridden if the title to the land was not registered, *e.g.*, a contract for sale, and he must do this either by appearing before the Chief Land Registrar and stating his case in person or by his solicitor or counsel or by submitting a statement in writing. Almost invariably the latter course is adopted. It is open to the Chief Land Registrar then either to order the caution to be cancelled or to appoint a time for a hearing but he cannot without a hearing order that the caution shall continue on the register. This I think is clear from the terms of section 55 and Rule 220 and it is obviously right because the entry of a caution on the register is such a serious interference with the rights of the registered proprietor that it ought not to be continued as a result of a mere *ex parte* application. The importance of cautions as a means of protecting adverse rights and claims may be gauged from the fact that about two thirds of all hearings spring from cautions.

Even when the title to land is not registered, anyone having an

interest in that land, *e.g.*, under a contract for sale, can register a caution against it. The effect of doing this is that when application is made to register the title to the land the application will not be completed until notice has been served on the cautioner giving him an opportunity to object to the registration, but if this results in a hearing it will be as an objection to first registration under the provisions of section 13 of the Act and Rule 298 and not under the special provisions relating to cautions against dealings which I have been describing.

An example of a hearing arising out of a caution against first registration occurred a short while ago in the case of the Whiteway Colony. This Colony started as a community of persons founded to practise Tolstoyan principles of sharing all things in common and having no individual property and the hearing was widely reported in the daily papers because of the statements made as to the way in which the early colonists lived. This is the one and only time a hearing in the Land Registry has featured as a *cause célèbre*. So far as the hearing was concerned the facts were that land of the Colony was allocated to the individual members on terms that they might occupy and cultivate it but individual ownership was not recognised, so that when a member died or left the Colony resumed possession of the land and re-allocated it to whoever took his place. A few years ago the members, fearing that one of their number would lay claim to the land she occupied on the ground that she had acquired a title to it by long possession, registered a caution against first registration of all the Colony land. Their fears were justified; an application for first registration of a plot of the land was made by a member of the Colony. Notice of the application was served on the Colonists who objected to the registration and this resulted in a hearing (*a*).

Practice and Procedure

So far I have been dealing with the nature and scope of the Chief Land Registrar's judicial powers and what I have told you about them can be found set out in the Land Registration Act or the Land Registration Rules. But there is no information there or anywhere else as to the practice and procedure in proceedings before the Chief Land Registrar. There is nothing corresponding to the Rules of the Supreme Court or the county court or to the *Annual Practice*. That this does not lead to difficulties or unfairness is due to the fact that in the case of hearings the Chief Land Registrar exercises a close control over the proceedings at all stages and ensures that the issues to be tried are clearly defined and

(*a*) This case is fully noted, *ante*, p. 3.

known to the parties and that there is no unreasonable delay at any point. The Chief Land Registrar's control of the proceedings springs directly from his prime responsibility for the maintenance of the register of title, since a hearing comes about because of an application to alter the register or to enter land on the register to which someone objects. The sanction which the Chief Land Registrar wields is the power to cancel the application or to dismiss the objection if not prosecuted with proper diligence.

Whether the objection is to an application for first registration or to a dealing with registered land, such as a transfer, or to the cancellation of a caution, the procedure is the same. The first step the Chief Land Registrar takes is to consider if the objector has disclosed a prima facie cause for objecting. If he has not he is asked to amplify or amend his reasons for objecting and will be given a time limit within which to do so. Then where the Chief Land Registrar is satisfied that a ground for objecting exists he notifies the applicant of the objection to his application. The notification is in the form of a letter which states the terms of the objection in detail or transmits a copy of the objection if this is more convenient. The name and address of the objector and of his solicitors, if any, are stated and the applicant is asked for his observations and comments on the objection. When these are received they are passed on to the objector by letter and his comments are requested. If it appears that anything will be gained in clarifying the issues or bringing the parties together these further comments will be sent to the applicant. In this way the parties are brought to define the issues in dispute between them in much the same way but with less formality than is done by pleadings.

When the Chief Land Registrar is satisfied that the issues have been settled, he will either of his own volition or at the request of the parties notify them that he will hear and determine the matter in dispute. The date and time of the hearing are fixed to suit the convenience of everyone concerned and, if the parties cannot agree, the Chief Land Registrar will himself specify a date and time. Formal notice of the hearing is served on the parties by registered post and copies of the notices are sent to their solicitors and served on all other persons who appear to be concerned. For example, in the case of a boundary dispute notice of the hearing will be given to the proprietors of registered charges affecting the properties concerned.

The notices are drawn up in simple language which, it is hoped, will be intelligible to a layman. The form differs slightly according to whether the hearing is under the general Rule 298 or arises out of a caution.

As an example of the kind of notice which is served I have selected one from an actual case where the applicant had applied to be registered as proprietor of a registered property in place of the existing registered proprietor on the ground that he had acquired a title to the land by adverse possession under the Limitation Act, 1939. This is it:—

H.M. LAND REGISTRY

Land Registration Act, 1925

Notice of a Hearing under Rule 298 of the Land Registration Rules, 1925

Title No. MX26543

Property: 19, Smith Street, Hounslow

To: Richard Roe, Esq.

of: 29, Arkville Road, London, S.E.14

IN the matter of an application by John Doe for registration of himself as proprietor of the freehold property above described.

WHEREAS a dispute has arisen within the meaning of Rule 298 of the Land Registration Rules, 1925, as to whether or not the said John Doe is entitled to be registered as proprietor of the said freehold property pursuant to section 75 of the Land Registration Act, 1925.

NOW, THEREFORE, take notice that the Chief Land Registrar will hear and determine the matter at H.M. Land Registry, Lincoln's Inn Fields, London, W.C.2, at 11 o'clock on Thursday the 24th day of May, 1956, and make such Order in the matter as he shall think just or refer the matter for the decision of the Court.

AND FURTHER TAKE NOTICE that you may attend before the Chief Land Registrar at that time in person or by your solicitor or counsel.

It is not obligatory to attend but if you do not attend such Order will be made and proceedings taken as the Chief Land Registrar may think just and expedient.

The form is dated and sealed with the official seal of H.M. Land Registry.

Where a caution gives rise to a hearing, Rule 220, the caution rule, will be substituted for Rule 298 in the heading, and the notice begins:—

In the matter of the application of Richard Roe, the registered proprietor of the freehold land registered under Title No. LN34221, to warn off a caution under Rule 218 of the Land Registration Rules, 1925.

Whereas cause has been shown under Rule 220 of the said Rules why the caution registered on February 20, 1956, against the said Title No. LN34221 in favour of John Doe shall continue to have effect.

Now therefore, take notice that the Chief Land Registrar will hear and determine the matter . . .

The notice then continues in the same form as a notice under Rule 298.

At this stage when the issues to be tried have been settled and the date of the hearing has been fixed the parties may apply for discovery, if necessary. The application is made to the Chief Land Registrar by letter requesting him to exercise his powers to compel the production of documents and, if satisfied that there are prima facie grounds for the application, he may require any person who has any deeds, instrument or evidence in his possession, to the production of which the applicant claims to be entitled, to show cause why he should not produce them. Unless cause is shown the Chief Land Registrar may order production at the applicant's expense. A fee of one guinea is payable for the order. Failure to obey the order may lead to punishment for contempt because the Chief Land Registrar can certify disobedience of his order to the High Court which will deal with the matter as if it was an order of the court itself that had been disobeyed. There is a right of appeal to the Chancery Division against the Chief Land Registrar's order and the court may annul or confirm the order with or without modification.

The parties may also apply for summons to secure the attendance of witnesses at the hearing to give evidence under oath. Forms of summons can be obtained at the Registry and when they have been completed they are sealed with the seal of H.M. Land Registry. A fee of five shillings is payable for each summons. Persons having the custody of maps, surveys or books made or kept in pursuance of any Act of Parliament may be summoned to produce them, and registered proprietors can be compelled to produce their land or charge certificates to enable necessary entries to be made on them, *e.g.*, to enter notice of a lease on the lessor's Land Certificate.

The declaration verifying service of the summons must prove that the reasonable charges of the attendance of the person

summoned and of his production of documents (if any) have been paid or tendered to him except where he is bound to attend and produce documents at his own expense, as, for example, a vendor who is required by section 110 (6) of the Land Registration Act, 1925, at his own expense to produce or procure production of his Land Certificate to enable a purchaser of part of the land in the title or a lessee to complete his purchase or lease by registration. Failure to obey a summons is punishable on summary conviction by a fine not exceeding £20. The initiative in prosecuting the offender would be taken by the injured party and not by the Chief Land Registrar.

A few days before the date of the hearing to enable satisfactory arrangements to be made in the Registry it is ascertained from the solicitors for the parties whether their clients will be represented before the Chief Land Registrar by counsel or by a solicitor and whether it is proposed to call any witnesses. They are also asked to state what reported cases or other authorities are likely to be referred to in argument so that the books may be available at the hearing. If the parties require a verbatim shorthand note of the proceedings they themselves must arrange for the attendance of a shorthand writer.

On the day of the hearing the parties with their solicitors, counsel and witnesses assemble at the appointed time in the room at the Registry where the hearing will take place. The proceedings are not strictly formal in the sense that neither the Chief Land Registrar nor counsel are robed but in other respects the hearing is conducted in accordance with the usual rules of procedure. The parties sit at a table, the applicant and his legal advisers on one side and the objector or respondent and his advisers on the other. The Chief Land Registrar sits at the head of the table and is accompanied by the legal officer who has had charge of the preliminary proceedings and who will make notes, administer the oath when necessary and prepare the final order. A clerk and a messenger are available to obtain books, take messages, etc. The witnesses sit at the back of the room unless it is decided to exclude them until they have given their evidence. The hearings are open to the public but the accommodation for them is limited.

The proceedings begin by the Chief Land Registrar calling upon the applicant's counsel or solicitor to open the case. His witnesses (if any) are then called and after being duly sworn are examined and cross-examined and, if necessary, re-examined in the customary manner and their evidence is summarised by counsel or the solicitor appearing for the applicant. Next the objector's or respondent's counsel or solicitor opens his case, calls his witnesses

and summarises their evidence. The applicant's counsel or solicitor is then allowed to reply and when he has concluded the Chief Land Registrar gives his reasoned decision and makes his order accordingly. In the case of cautions, Rule 220 gives examples of the kind of order that the Chief Land Registrar may make, as for instance that the caution shall continue to have effect, or that it shall cease to have effect and that the entry thereof on the register be cancelled, or that the registration be refused either with or without an inhibition against registration at any future time, or that it be completed conditionally, or with some modification, or subject to the prior registration of a dealing in favour of the cautioner, or subject to some notice condition, restriction or inhibition under the Act. One or other of these alternatives has been used at one time or another. If requested (and it is not often that a request is not forthcoming) the Chief Land Registrar will include in the order a direction as to payment of costs. Costs are on the High Court scale and the Act and the Rules provide that they shall be entirely within the Chief Land Registrar's discretion although there is a rather obscure provision in section 17 of the Act suggesting a limitation on that discretion. The section provides:—

> All costs, charges and expenses that are incurred by any parties in or about any proceedings or registration shall, unless the parties otherwise agree, be taxed by the taxing officer of the [Supreme] Court as between solicitor and client, but the persons by whom and the proportions in which such costs, charges, and expenses are to be paid shall be in the discretion of the registrar, and shall be determined according to Orders of the registrar, regard being had to the following provision, namely, that any applicant under this Act is liable prima facie to pay all costs, charges, and expenses incurred by or in consequence of his application, except—
>
> (a) in a case where parties object whose rights are sufficiently secured without their appearance; and
>
> (b) where any costs, charges, or expenses are incurred unnecessarily or improperly:
>
> Provided that any party aggrieved by any Order of the registrar under this section may appeal in the prescribed manner to the court, which may annul or confirm the Order of the registrar, with or without modification.

This provision that an applicant is prima facie liable to pay all costs appears to modify the ordinary rule that costs follow the event but each case is considered on its merits. Thus, where an

applicant applies for absolute title for the purpose of settling a really doubtful point of law which the objector would have been willing to leave undecided it seems hardly fair that the objector should have to pay the costs occasioned by his objecting.

On the other hand when a caution has been registered to protect a contract for sale which is being allowed to hang fire it would be equally hard that the registered proprietor should have to pay the costs of a hearing to compel the contracting purchaser either to proceed with the purchase or to withdraw the caution. As I say, the liability to pay costs is decided on the merits of each case and the decisions which have been made seem to have been regarded as just because I cannot trace that there has ever been an appeal against an order of the Chief Land Registrar awarding costs.

Appeals

This brings me to the question of appeals generally. Rule 299 provides that any person aggrieved by an order or decision of the Chief Land Registrar may appeal to the court, and in the case of cautions the same right of appeal is conferred by subsection (1) of section 56 of the Act. The Supreme Court Rules provide that the appeal must be instituted in the Chancery Division by originating summons. The summons is intituled in the matter of the property to which it relates (with a reference to the relevant land registration title number) and in the matter of the Land Registration Acts, 1925 and 1936, and must specify the particular section or sections of the Acts under which relief is being sought. The date mentioned in the summons for the hearing of the appeal must not be less than fourteen days after the service of the summons and the appeal must be brought within twenty-one days after the order or decision appealed against or within such extended time as the court hearing the appeal may think fit to allow. The summons will be heard and determined by a single judge of the Chancery Division nominated for that purpose by the Lord Chancellor and his decision will be final unless he or the Court of Appeal grants leave to appeal. The summons must state the grounds of appeal and no grounds other than those so stated may (except with the leave of the court hearing the appeal and on such terms as the court thinks just) be allowed to be taken by the appellant at the hearing. The court hears the matter *de novo* and for this reason does not call on the Chief Land Registrar to supply a copy of his notes of the hearing before him. The costs of the appeal and of the hearing giving rise to the appeal are in the discretion of the court.

It is important that the Chief Land Registrar should be notified

as soon as possible of the intention to appeal because no appeal from him or (unless otherwise ordered) from a decision of the court will affect any dealing for value that is duly registered before the appellant delivers to him a notice in writing of intention to appeal. When it is received this notice is entered on the register.

In spite of the fact that the Chief Land Registrar makes a practice of drawing to the notice of the parties this right of appeal from him, there have been no appeals for many years.

Perhaps I may conclude by saying that I think full advantage is taken of the speedy and cheap means of deciding disputes or resolving difficulties which is provided by hearings. The number of applications for a hearing varies between twelve and twenty a year but about half of these are settled before the time fixed for the hearing—sometimes at the last moment when the parties are actually assembled in the *Registry* a settlement is reached. This may not seem a great number, but then I do not think the number of disputes about land is very great and I have no reason to suppose that people take their troubles in the case of registered land to the High Court rather than to the Chief Land Registrar. With the extension of compulsory registration of title and the voluntary registration of large areas of land throughout England and Wales the number of hearings must inevitably increase. But I hope the increase will not be a rapid one because the preliminaries to a hearing take up a good deal of staff time, and as there are no fees prescribed for the hearing and the only fee which can be charged is a guinea for the Chief Land Registrar's order, hearings are not really a good proposition for a Department which is required to meet all its expenses out of its fee revenue and not to be a charge on public funds. But I am convinced that the jurisdiction vested in the Chief Land Registrar to hear and determine questions is of very great help in making the English land registration system work, and in my humble opinion the Royal Commissioners of 1870 were wise beyond their generation when they recommended that judicial powers should be conferred on the Chief Land Registrar.

STATUTORY " EASEMENTS "

By J. F. Garner, ll.m., Solicitor

In this article it is intended to consider the nature of the rights given by statute to local authorities and public utility undertakings in respect of sewers, gas or water mains, or electric cables, etc., laid in, under or across privately owned land by virtue of such powers. The right to lay a sewer or main may be acquired by agreement with the landowner, and in such a case it is clear that the resultant " wayleave " (*a*) is an ordinary easement (*b*), or possibly a mere licence (*c*). In other circumstances the authority may use their statutory powers to acquire the actual parcel of land through which the sewer or main is to run, either by agreement or by means of a compulsory purchase order. In either of these cases, the juristic nature of the rights acquired is clear; sometimes, however, a right may be acquired simply to lay a sewer or main through a particular parcel of land, without actually acquiring that land. Special statutory authority is necessary so to carve out, as it were, the right to lay a main, from the bundle of rights constituting ownership in the particular parcel of land affected, but all the enabling statutes of local authorities and statutory undertakings confer such rights (*d*). The problem is, what is the nature of that right to lay a sewer, etc.; is it an easement (*e*), does it amount to the passing of ownership in the actual segment of soil through which the sewer, etc., actually runs, and, if so, what rights are conferred in respect of the soil above and below the sewer, or is it a mere licence dependent for its terms on the enabling statute itself; that the problem is not purely academic was shown recently

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(*a*) This is a term used in the gas, electricity and water industries to refer to all types of rights to lay and maintain pipes, mains, etc., through privately owned land, however such rights may be acquired.

(*b*) The dominant tenement for the benefit of which such an easement may be enjoyed and to which it may be appurtenant is capable of being the other rights, easements, etc., of the undertaking: *Re Salvin's Indenture* [1938] 2 All E.R. 498.

(*c*) According to whether it is created by deed or by agreement by hand or orally. Many existing " wayleaves " where the undertaking pay an annual " acknowledgment rental " are probably mere licences for value.

(*d*) See Public Health Act, 1936, s. 15 (sewers), Gas Act, 1948, s. 11 (gas), Electricity Act, 1947, s. 10 (2) (electricity), Public Health Act, 1936, ss. 119 and 15, or Water Act, 1945, Third Schedule, art. 7, as amended by s. 11 (1) of the Water Act, 1948 (water, in both cases).

(*e*) " The list of easements is not closed," say the academic lawyers, and the statement is surely self-evident since *Re Ellenborough Park* [1955] 3 W.L.R. 892; [1955] 3 All E.R. 667.

in the interesting case of *Newcastle-under-Lyme Corporation* v. *Wolstanton Ltd.* (*f*), discussed below.

First, however, we must examine the incidents of these rights, as established in reported cases, in order that their exact nature may be established.

Incidents of the Right

The right to lay a sewer or a gas main through the land of a private individual, as given by statute, includes, without specific mention in the enabling statute, all ancillary rights necessary for the reasonable enjoyment of the principal right; as Brett L.J. said in *Re Corporation of Dudley* (*g*), at p. 93, "where the legislature gives power to a public body to do anything of a public character, the legislature means also to give to the public body all rights without which the power would become wholly unavailable, although such a meaning cannot be implied in relation to circumstances arising accidentally only." Thus, such a right must also confer, it is submitted, the right to enter on the private owner's land and there to construct the sewer or other conduit (*h*), and subsequently to re-enter and carry out any necessary works of maintenance and repair thereto (*i*). The general principle has been applied so as to give a sewer authority a right to subjacent support for its sewers when mining operations were undertaken (*k*), and also to give a gas company a right to have their mains protected against abnormal use of the surface land which caused an injury to the mains (*l*). This second named right is given statutory

(*f*) [1947] Ch. 427; [1947] 1 All E.R. 218.

(*g*) (1881) 8 Q.B.D. 86.

(*h*) In many cases the statute gives an express power of entry for the particular purpose. Thus, in order to lay a sewer under s. 15 of the Public Health Act, 1936, the local authority may exercise the power of entry on the land given by s. 287 of that Act, and, as that section prescribes a procedure, that procedure must be observed in such a case.

(*i*) The statutory authority will normally be under a duty to maintain its mains and other apparatus in good repair and condition; thus, s. 23 of the Public Health Act, 1936, requires a sewer authority to "maintain, cleanse and empty" all public sewers vested in them.

(*k*) See, *e.g.*, *L.N.W.R.* v. *Evans* [1893] 1 Ch. 16 (right to construct a canal under statutory authority). It seems that such a right of support will be implied only where there is a duty to pay compensation in respect thereof, as for example, under s. 278 of the Public Health Act, 1936: *Metropolitan Board of Works* v. *Metropolitan Railway Co.* (1869) 4 C.P. 192. Certain action has now to be taken by sewer and gas authorities in mining areas in order to safeguard their rights of support, under the Public Health (Support of Sewers) Act, 1883: *Newcastle-under-Lyme Corporation* v. *Wolstanton Ltd.* (*supra*).

(*l*) *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbots, Kensington* (1885) 15 Q.B.D. 1, where a gas company were held to be entitled to sue the highway authority in respect of damage caused to their gas main as a consequence of the use of a steam roller by the highway authority for road repairs.

recognition in the case of sewers (*m*), in that the local authority can prevent any new building from being erected over a public sewer the line of which has been shown on a sewer map (*n*). Further, it seems that a public undertaking having a main in privately owned land may sue another undertaking which allows water, gas or electrical energy, etc., to escape from their main adjacent to that of the plaintiffs and thereby cause injury thereto, in accordance with the doctrine of *Rylands* v. *Fletcher* (*o*). For the purposes of rating law, a public utility undertaking are in beneficial occupation of their mains, etc., laid in privately owned land, and therefore are rateable in respect thereof (*p*): "the company is in possession of the mains buried in the soil, and so are *de facto* in possession of the space in the soil which the mains fill for a purpose beneficial to itself" (*q*). Further, all public undertakings are given, by their enabling statutes, the right to break up the surface of streets (whether or not they are repairable by the inhabitants at large) for the purpose of laying mains, etc., subject only to due compliance with the somewhat complicated procedure of the Public Utilities Street Works Act, 1950.

In *Re Salvin's Indenture* (*supra*), it was said that a right of the nature of which we are discussing is an incorporeal hereditament (*r*), but as the distinction between corporeal and incorporeal hereditaments is today very largely one of academic interest, it seems doubtful whether this statement takes the argument very much further.

Ownership(?)

It is first convenient to consider whether the right in question can be said to amount to ownership of the segment of soil through which the sewer or main actually passes. The leading case in

(*m*) The statutory provisions also apply to local authority water mains laid under the Public Health Act powers: *Abingdon Corporation* v. *James* [1940] Ch. 287.

(*n*) Maintained under s. 32 of the Public Health Act, 1936. The control is exercised through the medium of the building bylaws, and by virtue of s. 25 of the 1936 Act.

(*o*) *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914] 3 K.B. 772.

(*p*) *R.* v. *Rochdale Waterworks Co.* (1813) 1 M. & S. 634 (water); *R.* v. *Brighton Gas Co.* (1826) 5 B. & C. 566 (gas); *St. James' and Pall Mall Electric Light Co.* v. *Westminster A. C.* [1934] A.C. 33 (electricity); *West Kent Main Sewerage Board* v. *Dartford Union A. C.* [1911] A.C. 171 (sewers). Special provision has now been made for the rating of electricity and gas undertakings, and public sewers are exempt from rates under the Rating and Valuation (Miscellaneous Provisions) Act, 1955. It is also perhaps worth noting that a "mere easement" is not rateable: *see* Ryde on *Rating*, 9th ed., at p. 62.

(*q*) *Per* Wightman J. in *R.* v. *West Middlesex Waterworks Co.* (1859) 1 E. & E. 716.

(*r*) See the judgment of Farwell J. at [1938] 2 All E.R., p. 506.

support of such a proposition is *Taylor* v. *Oldham Corporation* (*s*). In this case Sir George Jessel M.R. was discussing the nature of the right in the soil vested in a sewer authority, and said (at p. 411), "it was found under the old law, and it was sometimes held, that the sewer authorities . . . had only an easement, and it was found to be very inconvenient, and consequently in the modern Acts the property in the sewers has been vested in the sewer authorities. That is to say, that, instead of allowing the subsoil to remain in the owner of the soil, subject to easement or right of sewerage or drainage, the absolute property in the sewer (which means not merely the brick barrel, or whatever it may be, forming the sewer, but the whole interior of the sewer, that is, the whole of the space occupied by it) is now vested in the sewer authorities. And if the sewer is a large one, it amounts in substance, for all useful purposes, to the whole of the subsoil, and that is absolutely vested in the Corporation." This expression of the law has been cited and followed in a number of cases since Sir George Jessel's day, in particular in connection with claims for compensation in respect of the laying of a sewer in privately owned land. For example, in *Thurrock Grays & Tilbury Joint Sewerage Board* v. *Thames Land Co.* (1926) 90 J.P. 1, it was established that compensation in respect of laying a sewer through land under the powers given by what is now section 15 of the Public Health Act, 1936, was to be assessed on the basis of a compulsory acquisition of land.

However, in spite of such decisions, and even if they are to be read as vesting the segment of soil through which the sewer or another main actually runs in the statutory undertakers, it is submitted that such "ownership" cannot be absolute. It is doubtful whether the undertakers are entitled to remove and use for some other purpose (without the consent of the landowner and within specific statutory authority, as in section 6 of the Gasworks Clauses Act, 1847) the soil that is excavated to make room for the pipes; further, if the pipes are subsequently removed (*t*), it seems that the undertakers could not use the empty space for some other purpose. In *R.* v. *Staines Local Board* (*u*), a former private drain

(*s*) (1876) 4 Ch.D. 395; see in particular the judgment of Jessel M.R., at p. 411.

(*t*) Discontinuance of user of the pipes for the purpose for which they were intended may give rise to nice juristic problems. The pipes themselves can presumably be abandoned, and so become *res nullius* if evidence of abandonment is established but ownership of land cannot be abandoned. In the case of a public sewer, the local authority cannot, apparently, avoid liability for its maintenance merely by abandonment, for "once a public sewer, always a public sewer."

(*u*) (1888) 60 L.T. 261.

vested by statute in the local authority as a public sewer. It was held that the local authority could not interfere with private rights to use that drain acquired before the conduit had vested in them: "the sewers it is true vested in the defendants, but they had only a qualified property in them" (*per* Field J.) (*a*).

In the important case of *Newcastle-under-Lyme Corporation* v. *Wolstanton Ltd.* (*b*), this view that the undertakers have a right of ownership of the soil in which its pipes are laid, was expressly discounted by Evershed J. (as he then was) at first instance, and his view was on this point supported by the judgments in the Court of Appeal (*c*), although *Taylor* v. *Oldham Corporation* does not seem to have been referred to by any of the learned judges who decided the case. What the *Wolstanton* case actually established is not too easy to say, and we shall have occasion to return to it later, but it is certainly an authority against the "ownership" theory. The enabling statutes themselves seem to suggest that Parliament did not intend ownership to pass. Section 15 of the Public Health Act, 1936, merely empowers the local authority to construct a public sewer "in, on or over any land not forming part of a street, after giving reasonable notice to every owner and occupier of that land," and a separate section (*d*) provides for the compulsory acquisition of land for sewerage or other public health purposes. By section 11 of the Gas Act, 1948, a Gas Board may be authorised by the Minister of Fuel and Power to purchase compulsorily "a right" to place a gas pipe across land, either above or below ground, and to repair, maintain and remove the pipe, without purchasing any other interest in the land; a similar right is given to Electricity Boards by section 10 (2) of the Electricity Act, 1947.

Easement (?)

It could be argued that the right to lay a main, etc., is capable of being a legal easement, the dominant tenement being the rest of the undertaking of the authority owning the right (*e*). In

(*a*) The authority similarly have no power to stop up a sewer vested in them, or physically to disconnect any drains therefrom: *Ogilvie* v. *Blything Union R. S. A.* (1891) 65 L.T. 338. In *Bradford* v. *Mayor of Eastbourne* [1896] 2 Q.B. 205, Lord Russell C.J. said, "It has been clearly held that the vesting is not a giving of the property of the sewer and in the soil surrounding it to the local authority, but gives such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter."

(*b*) [1946] 2 All E.R. 447.

(*c*) [1947] 1 All E.R. 218.

(*d*) Public Health Act, 1936, s. 306, as amended by the Acquisition of Land (Authorisation Procedure) Act, 1946.

(*e*) *Re Salvin's Indenture* (*supra*).

many cases and textbooks the right has been described as an easement (*f*), somewhat loosely. Moreover, "it is true that the rights of the undertakers are the creatures of statute, and that it is within the competence of Parliament to confer or create interests without regard to those incidents which are regarded as requisite to an agreement *inter partes*. Thus, Parliament may create an easement in gross . . ." (*g*). However, the fact remains that there need not necessarily be any dominant tenement, for the particular main to be laid may be the first section of a new scheme, and the right granted by the statute in the particular segment of land in which the main is laid excludes totally (at least until the main is removed, if ever) the rights of the owner of the surrounding soil (*h*). More conclusively, this view of the nature of the right was expressly denied in the *Wolstanton* case (*i*).

Exclusive occupation.

The only remaining explanation, it is submitted, is that the rights given by the statute are *sui generis*, fit in with no known other jurisprudential concept, and amount to an exclusive right to occupy the space or cavity occupied by the actual pipes themselves. This seems to be the result of the decision of the Court of Appeal in the *Wolstanton* case. Evershed J. at first instance had held that in addition the local authority had an exclusive right to occupation of that subterranean part of the soil on which the pipes rest. In his judgment in the Court of Appeal (at p. 224), Morton L.J. said "I do not think that the Corporation has the exclusive right to occupy anything except the space which is filled by its pipes. To test this, let me assume that some person, not authorised by the corporation, removed all the soil round a portion of the corporation's pipe, being careful to do no damage to the surface of the pipe and providing sufficient support to prevent any damage by subsidence. Could it be said that that person had committed a trespass against the corporation? In my judgment, no. If this is so, it seems to follow that the corporation has not the exclusive right to occupy any part of the soil by which its pipes are surrounded. I may add that if the corporation are the occupiers of a "cylinder" of soil round their pipes, I can find

(*f*) However, it is not referred to at all in the current edition of Gale on *Easements*, the example given of easements created by statute being rights of way created by Inclosure Acts (12th ed., at p. 37).

(*g*) *Per* Evershed J. in the *Wolstanton* case [1946] 2 All E.R., at p. 453, cited with approval by Morton L.J. at [1947] 1 All E.R., p. 223.

(*h*) As was pointed out by the late Dr. Sweet in his article, "The Easement of Tunnelling" (1916) 32 L.Q.R. 70, an easement cannot grant the exclusive use of land; and see *Reilly* v. *Booth* (1890) 44 Ch.D. 12.

(*i*) [1947] 1 All E.R., at p. 224.

no satisfactory answer to the question: "How thick is that cylinder?"

The right vested in the statutory undertakers in the soil through which the pipes run is thus, it is submitted, something more than a "mere" easement, but also is something less than ownership. As we have seen, it amounts to beneficial occupation in the rating sense, and it is an incumbrance on the ownership of the land in or through which the pipes run, and therefore should be disclosed by a vendor on a sale of that land (*k*). Some local land registrars register the existence of a public sewer or local authority owned water main (*l*) in the local land charges register maintained under section 15 of the Land Charges Act, 1925, on the argument, presumably, that the existence of such a main under the land imposes a restriction on the use of the land, in that no new buildings may be erected over the site of the main (*m*). It is submitted that such a view is erroneous, in that local land charges (apart from entries that are expressly required to be registered under some express statutory provision) are defined (*n*) to be "any prohibition of or restriction on the user or mode of user of land or buildings imposed by a local authority." In these cases, it is submitted that although the main is laid in the land as a consequence of action taken by the local authority, the restriction on the use of land imposed by section 25 of the Public Health Act, 1936, is imposed as a direct consequence of the general law, and is not a restriction "*imposed* by the local authority."

In the *Charing Cross* case (*o*), the right of the electricity company to lay their cables in the land, and the corresponding right of the water company in respect of their mains, were dealt with as being mere licences—"this is a simple case of two independent persons licensed to pass their apparatus through soil" (*p*). This seems, with respect, somewhat an unreal description of the right. If it is in fact a licence, the licence is one which is incapable of being revoked by the owner of the land through which the mains are laid (*q*), and the licensee authority enjoy without his consent the many ancillary rights referred to earlier in this article.

(*k*) *Pemsel and Wilson* v. *Tucker* [1907] 2 Ch. 191.

(*l*) There would be no question of the rights in respect of their mains enjoyed by company water authorities, by gas boards, or by electricity boards being so registrable, for local land charges (apart from the special statutory exceptions) must have been imposed by a local authority.

(*m*) Public Health Act, 1936, s. 25, and see note (*m*) (*supra*), p. 210.

(*n*) Land Charges Act, 1925, s. 15 (7), as amended by the Schedule to the Law of Property (Amendment) Act, 1926.

(*o*) *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914] 3 K.B. 772.

(*p*) *Per* Lord Sumner, at p. 781.

(*q*) And is one which comes into existence, in many cases, quite contrary to the wishes of the landowner.

AGRICULTURAL GRANTS

By J. F. Phillips, ll.m., Barrister-at-Law

The law today provides facilities for grants towards the cost of many improvements and operations which may be undertaken by the owners and occupiers of agricultural land; and the purpose of this article is to give a reasonably comprehensive account of these grants. Nearly all of them are of war-time or post-war origin, and derive from the agricultural policy pursued in this country by successive governments since 1939. The grants may roughly be classified into those of a long-term capital character, and those related to annual production from the land. Indeed, the latter group, which has steadily increased in scope in recent years, comprises those grants which are in substitution for, or are complementary to, guarantees of prices of farm produce given by the Government under Part I of the Agriculture Act, 1947.

It is convenient to consider first the provisions for grants of a long-term capital character, since these are of direct concern to the owner of land as such, whether he is a farming owner-occupier or the estate owner of land let to a farming occupier.

1. Long-term Capital Grants

Two general points should be noted concerning any project involving capital expenditure on agricultural property. The first is that applications for grant, where available, will not be entertained at all unless the applications are made, and approved, before any work starts on the project; and secondly, the capital expenditure falling upon the owner or tenant of the agricultural land in question will normally qualify for tax relief (on ten per cent. of the expenditure each year for ten years) under section 314 of the Income Tax Act, 1952. Reference may now be made to individual projects for which grant aid is available.

(A) Housing

(i) *Building of new Houses*

Under section 3 of the Housing (Financial Provisions) Act, 1938, an Exchequer grant could be paid of £10 a year for forty years to private persons who provided houses for the " agricultural population," as defined by section 115 (2) of the Housing Act, 1936.

Certain conditions had to be complied with; for example, the size and construction of the house had to be "suitable," in the opinion of the local housing authority—normally the Rural District Council —and the rent at which the house was to be let was strictly controlled, since usually the rent must not exceed the amount of the deduction from wages permitted to be made for occupation of a service cottage under the agricultural wages legislation. This deduction is today 6s. per week, unless a certificate has been issued by the County Wages Authority in relation to the specific house in question authorising a higher deduction. Approval of the case for grant was entirely at the discretion of the local housing authority, and was based on the footing that there was, in the district, a need for housing accommodation for the agricultural population, which could be more conveniently met by action by private people than by the local authority.

These provisions of the 1938 Act were amended, as respects houses built after April 18, 1946, by the Housing (Financial and Miscellaneous Provisions) Act, 1946, s. 13, in three ways. First, the rate of grant was increased from £10 to £15 a year for forty years. Secondly, it was in effect provided that a house to be occupied as a service cottage could not benefit from the grant, since no annual payment of grant could be made for any year during the whole or part of which the house was occupied by a person who was not the owner or a tenant. Finally, the amount of rent which might be fixed by the council was not limited to the permitted deduction from agricultural wages for a service cottage; it was to be fixed by the council so as not to exceed the rent which they might have charged if they had built the house.

The position was again altered by the Housing Act, 1952. By section 2 (1) of that Act, the disqualification of the service cottage from eligibility for grant was removed, with the consequence that grant became payable in respect of the financial year ending March 31, 1953, and thereafter, for houses provided and occupied under a contract of service, if such occupation was the only bar to payment. The 1952 Act, s. 2 (3), (4) and (5), went on to give a degree of security of tenure to service occupants of houses built with the assistance of grant after April 17, 1946, by providing that the annual payment of £15 should cease unless the occupier and his dependants were given four weeks' security of occupation from notice to end, or the ending of, the contract of service, according to the circumstances.

To bring the story right up to date, reference must now be made to the Housing Subsidies Act, 1956, which became law on March 28, 1956. Pursuant to section 7 of that Act the annual payment is

once more reduced to £10 a year for forty years. This applies to houses built after March 28, 1956.

To sum up then, a private person who proposes to build a house for occupation by a member of "the agricultural population," *i.e.*, normally, a farmworker, may apply to the local housing authority for approval of grant of £10 a year for forty years, whether the house is to be tenanted or "tied." If the application is granted the owner will be subjected to certain conditions. He will be restricted in the rent which he can charge if the house is to be let, and if it is to be a service cottage, the occupants will have a degree of security of tenure as explained above.

(ii) *Improvement and Conversion*

Before and during the 1939–1945 war, provision was made by a series of Housing (Rural Workers) Acts for grants to be made towards the cost of "reconditioning" houses for farmworkers. These Acts expired after the war ended, but under the Housing Act, 1949, s. 20, it again became possible to apply for assistance towards meeting the cost of improving dwellings or providing them by the conversion of houses or other buildings. This provision applies to urban as well as to rural properties.

The provisions of the 1949 Act were amended by section 2 of the Housing Act, 1952 (already noticed above in connection with grants for building new houses), and by section 16 of the Housing Repairs and Rents Act, 1954. The combined effect of these provisions is that a local housing authority (normally, in the countryside, the rural district council) may approve an application for grant-aid in respect of works of improvement or conversion. The grant may be up to fifty per cent. of the approved cost but cannot exceed £400; there is power to vary this limit by regulations. Cases where the cost of improvements is less than £100 will not be entertained for grant; and it must in all cases be realised that the local authority have unfettered discretion to approve or reject applications. They need give no reason for their decision, nor is there any appeal to the Minister of Housing and Local Government therefrom; but the Minister did issue in April, 1954, some strongly worded guidance in a circular addressed to all authorities, and since that time there has been a substantial increase in the number of applications approved for grant.

Certain conditions must be complied with. The applicant for grant must show that he owns the fee simple of the property the subject of the application, or that he has a leasehold term thereon for at least fifteen years unexpired. The dwelling when improved or converted must conform to the standard laid down by the

Minister and must be likely to provide satisfactory housing accommodation for at least twenty years hence, or such shorter period as prescribed by the local authority.

If the house is let, the authority must prescribe the maximum rent in accordance with rules set out in the 1949 Act, s. 23, as amended, and, if it is occupied as a service cottage by a member of the agricultural population, the occupants are given by section 2 of the Housing Act, 1952, a limited degree of security of tenure, as explained *ante*, p. 216. Breach of any condition imposed gives rise to liability for repayment of the whole or part of the grant with interest; and the conditions must be observed for twenty years from the completion of the improvement works, or such shorter period as the authority prescribe.

Incidentally, the cost of works ranking for grant may include the fees of an architect, engineer, surveyor, land agent or other professional adviser or supervisor.

(B) Improvement of Livestock Rearing Land

Under the Hill Farming and Livestock Rearing Acts, 1946 and 1954, financial assistance can be obtained by owners and occupiers of " livestock rearing land " who are willing to carry out schemes for the improvement of their land. These Acts are due to expire in November, 1956, but the Minister of Agriculture announced in the House of Commons on March 15, 1956, the intention of the Government to introduce legislation extending the period of operation of these Acts by a further seven years and for that purpose to make a further £5 million available. The grants which may be paid by the Minister of Agriculture amount to fifty per cent. of the reasonable cost of the work of improvement. The work in question must, of course, be approved by the Minister before it is begun if grant is to be payable.

" Livestock rearing land " under the Acts means land situated in an upland area which is or by improvement could be made suitable for use for the breeding, rearing and maintenance of sheep or cattle, but not to any material extent for dairy farming, the fattening of sheep and cattle or the growing of crops for sale. The definition covers both hill farming land and other livestock rearing land in the same general area. If farming activities other than breeding or rearing of store cattle or store sheep are carried on, such as the production of milk for sale, it will not necessarily disqualify the case for grant; it will depend upon the part which those activities play in the hill farming enterprise.

Improvement schemes may be submitted by owners or tenants of livestock rearing land. Sometimes " co-operative schemes "

submitted jointly by neighbouring owners and/or tenants are dealt with, for example, where the works include the improvement of a common access road or the provision of a water supply. The scheme must in any case be sufficiently comprehensive in the opinion of the Minister, and he must be satisfied that the land comprised in the scheme is an area suitable to be dealt with as a unit. He must also be satisfied that the land in question ought to be used for livestock rearing purposes and cannot be better put to some other use.

Application for grant is made to the County Agricultural Executive Committee who are always prepared to give considerable assistance to applicants in preparing a detailed scheme. The list of improvements eligible for grant under these Acts if included in approved schemes is as follows:—

(a) The erection, alteration, enlargement or reconditioning of farm buildings, farmhouses or farm cottages.

(b) Making or improvement of roads or bridges and of piers, jetties or slips, *i.e.*, the construction or improvement of access or private roads but not works on roads or bridges which are the responsibility of highway authorities. As to the latter roads see reference to the Agriculture (Improvement of Roads) Act, 1955, below.

(c) Making or improvement of watercourses, ponds or wells or works for the application of water power or for the supply of water for agricultural or domestic purposes. This covers connection with public water mains where available as well as the provision of a private supply.

(d) Execution of works for or in connection with the supply of electricity for agricultural or domestic purposes. This again covers not only connection with a public supply but the provision of private generating plants.

(e) Provision or improvement of accommodation for the dipping or treatment of sheep or cattle.

(f) Provision or improvement of pens and other equipment for use for or in connection with the sheltering, gathering, marking, dipping or treatment of sheep or cattle.

(g) Construction or improvement of silos of a permanent character.

(h) Making, removing, restoring or improving permanent fences.

(i) Provision or improvement of grids designed or adapted to prevent the passage of sheep or cattle. Here it should be noted that, where the grid is constructed in a private road, grant can be paid on the cost of improvement or construction but, where the grid is on a public highway, grant can

only be paid where the applicant for the improvement scheme is contributing towards the cost of installing the grid under an agreement made with the Highway Authority under the Highways (Provision of Cattle-Grids) Act, 1950. The contribution may then rank for grant.

(j) Drainage. This covers not only ditching but also tile and mole drainage and where necessary protective fencing.

(k) Reclaiming of waste land. Generally this type of work will be covered by other items of improvement but some proposals not specifically covered by such other items may be included under this general head.

(l) The establishment of shelter belts.

(m) The liming of land.

(n) The application to land of artificial or other manure which is purchased.

(o) The laying down of permanent pasture.

(p) The reseeding and regeneration of grazings and other cultural operations.

(q) The removal of bracken, whins, gorse, bushes, scrub, stumps, roots, boulders or other like obstructions to cultivation.

(r) The burning of heather or grass or making muirburn.

(s) Provision of machinery and implements. The cost of machinery and implements specifically required for work in connection with an improvement scheme may be approved for grant where it is reasonable to suppose that the useful life of the machine will be exhausted in carrying out the work. In certain circumstances the cost of hiring may be allowed.

(t) Pest destruction. Grant will only be paid towards the cost of necessary materials needed for carrying out approved schemes of pest destruction.

(C) Roads

The Agriculture (Improvement of Roads) Act, 1955, provides authority for grants to be paid for the improvement of certain roads in or affording access to livestock rearing areas. These areas are generally as defined for the purposes of the Hill Farming and Livestock Rearing Acts above referred to. Only those roads which are unclassified or unadopted and which are situated in or afford access to livestock rearing areas may be the subject of application for grant. Unclassified roads are, of course, the responsibility of the highway authority; unadopted roads are those not taken over by the highway authority.

Under the Act the total amount of grant is limited to £4 million and may be paid only in respect of proposals approved within a period of seven years which began on December 21, 1955. But there is no limit on the rate of grant imposed by the Act and the actual rate may vary in individual cases, or as between, for example, unclassified and unadopted road schemes respectively. So far as unadopted roads are concerned a proposal cannot be approved for grant unless the authority submitting the proposals are prepared to take over the road and become responsible for its future maintenance. The Act makes clear that it is for the highway authority to promote road improvement schemes. Persons interested should accordingly make an approach in the first instance to the highway authority or to the County Agricultural Executive Committee for the area. "Improvement" includes the provision for the road of a cattle grid and of any works required in connection therewith as well as the widening and cutting off of road corners.

The Act makes special provision enabling local authorities to enter into agreements with persons who are willing to pay *voluntary* contributions towards the improvement of any unclassified or unadopted road as above-mentioned.

(D) Water Supplies

Exchequer grants are available towards the cost of provision of water supplies for agricultural and horticultural holdings, allotments and farmhouses and cottages occupied by agricultural workers. The work which may be included in a scheme submitted for grant aid includes the following:—

(a) The provision of new water supply installations or extensions of existing installations to fields and buildings used in connection with any type of agricultural or horticultural production. It is a condition of grant that the increased food production expected to result from the proposed work shall be such as to justify the expenditure of the amount of grant provided.

(b) The extension to existing farmhouses or cottages occupied by agricultural workers of new or existing farm water systems supplying water to fields or farm buildings. Schemes for the provision of connection to the public mains or based on a private source of supply may be grant aided; but the Minister reserves the right to reject for grant aid any scheme for providing a domestic supply from a private farm water system where it seems likely that a supply may be obtainable within a reasonable period from a public main.

Replacement work is generally not eligible for assistance under these provisions.

In the case of public mains, grant aid may be paid to the statutory water undertaker direct in respect of the expense of providing new mains or extensions to existing mains as part of a rural water supply scheme. The private person may obtain a grant at a flat rate of 25 per cent. under the above provisions towards the cost of piping water from the public mains or from a mains extension. If, however, the scheme is based on a private source, such as a well or borehole, the reasonable cost of the work will rank for grant at a flat rate of 40 per cent.

The statutory authority for the above provisions is now section 1 of the Agriculture (Miscellaneous Provisions) Act, 1954, which re-enacted, without limit of time, provision for grant aid of water supply schemes originally made under the Agriculture Act, 1947. Application for grant should be made to the County Agricultural Executive Committee for the area in question.

(E) Ditching and Drainage

Grant aid is available towards the cost of ditching and underdrainage. Provision for this is also now made under section 1 of the Agriculture (Miscellaneous Provisions) Act, 1954, re-enacting, without limit of time, earlier provision made by the Agriculture Act, 1947. The provision for grant covers reconditioning and improvement as well as construction, but normal maintenance work is not eligible for grant.

As respects ditching, where the County Agricultural Executive Committee think it necessary that the ditching to be improved should be fenced, a reasonable charge for fencing of a simple type may be added to the cost eligible for grant aid. As respects underdrainage, schemes may now be submitted for tile and mole drainage, which may qualify for a grant of 50 per cent. of the final cost provided that the Ministry of Agriculture are satisfied that the most economical system of drainage has been devised and that the likely benefits to food production justify the making of a grant.

(F) Long Term Capital Grants Generally

The general notes on long term capital grants at the beginning of this article mention the fundamental rule that applications for grant where available will not be entertained unless the application is made and approved before any work starts on the project. Reference is also there made to the question of tax relief on capital expenditure. One final point of general interest should be noted.

In computing the cost of a project for the purposes of grant aid the applicant may generally include not only the cost of labour and materials employed by him specifically for the project in question, but also the estimated reasonable cost of labour employed by him for other purposes but which was engaged on the particular project, *e.g.*, his own farm workers. He may not, however, include any sum representing the notional cost of his own manual labour or supervision on the work.

2. Production Grants

In addition to the provision made, as outlined above, for financial assistance towards the cost of execution by owners and occupiers of agricultural land of works of a long term capital character, grants are also available in respect of many farming operations, much shorter term in character, and normally described as "production grants." Some of these indeed also relate to works of a capital character, but the production grant is generally intended to make a contribution towards reducing the cost of food production, as part of the system of guarantees of price of the major farm products established under Part I of the Agriculture Act, 1947.

(A) Agricultural Lime Scheme

The Agriculture Act, 1947, as amended by section 2 of the Agriculture (Miscellaneous Provisions) Act, 1954, empowers the Minister of Agriculture to make schemes providing for the payment of grants towards the cost of purchasing lime for use on agricultural land and of transporting lime for this purpose and spreading it. The 1954 Act extended the period during which such grant aid could operate until the end of July, 1959; and also provided that this period may from time to time be extended by a further five years by order made subject to affirmative resolution procedure in each House of Parliament.

The scheme operating in 1955 under this provision (S.I. 1955 No. 473) laid down that the grant payable towards the cost of purchasing, transporting and spreading the lime was to be 60 per cent. of the cost incurred in respect of lime delivered on or after April 1, 1955, except that between May 16 and September 10, 1955, the subsidy was to be increased to 70 per cent.

Following the annual review of farm prices in March, 1956, the Government published in accordance with established practice a White Paper (Cmd. 9721) giving details of the conclusions reached. This indicates that the provision for lime subsidy will

be continued in 1956 on a similar basis to that which obtained in 1955.

(B) Fertilisers

By the Agriculture (Fertilisers) Act, 1952, provision is made to empower the Minister of Agriculture to promote schemes for relieving (by grant aid) occupiers of agricultural land of part of the expenditure which they would otherwise incur in respect of fertilisers acquired by them to be applied to such land to improve the fertility of the soil. The amount of the contribution to be provided by a scheme under the Act is left to the discretion of the Minister, with Treasury approval, but the rate of grant must not exceed one half of the cost of the fertiliser to the occupier. The Act contains provision for a succession of schemes, so long, however, as no scheme operates for a period exceeding two years. Each scheme requires approval, by affirmative resolution, of each House of Parliament.

The White Paper (Cmd. 9721) above referred to declares (para. 32) that the Government "have decided that further encouragement should be given to the use of fertilisers so far as supply and technical considerations allow. From July 1, next [*i.e.*, 1956] increased rates of subsidy will be fixed for nitrogen and phosphates involving (on the rate of consumption in the current year) additional payments of £3 million in aggregate." The Fertilisers (England, Wales and Scotland) Scheme (S.I. 1955 No. 994) made on July 4, 1955, set out in detail the types of nitrogenous and phosphatic fertilisers which qualify for grant aid under the scheme, and the rates of contribution per ton, in respect of the period from July 1, 1955, to June 30, 1956.

(C) Ploughing Grants

The Agriculture (Ploughing Grants) Act, 1952, makes provision for the payment of ploughing grants in accordance with schemes to be promoted by the Minister of Agriculture with the approval of the Treasury. It is left to the scheme to specify the rate of grant and to define or limit the type of land under grass in respect of which the grant may be made. The Act gives power to make a succession of schemes but each one must not exceed one year in operation. Each scheme requires the approval, by affirmative resolution, of each House of Parliament.

The scheme at present in operation, *i.e.*, the Ploughing Grants Scheme, 1955 (S.I. 1955 No. 693), is in two parts. The first part provides for a grant to be made at the rate of £7 an acre

to occupiers of grassland brought under the plough, where, after ploughing, an approved crop is grown. To be eligible for ploughing grant the grassland must be at least three years old. The second part of the scheme relates to grassland in respect of which the Minister is satisfied that abnormally heavy expenditure would be required to bring it into productive use. The land must have been down to grass since 1939. A grant of £12 per acre is payable under this part of the scheme but each case requires the individual approval of the Ministry of Agriculture.

(D) Calf Subsidy

Under the Agriculture (Calf Subsidies) Act, 1952, provision is made enabling the Minister of Agriculture to promote schemes for the payment of subsidies in respect of calves. The Act makes provision for a possible succession of schemes, but each must not exceed three years. The Calf Subsidies (England and Wales and Northern Ireland) Scheme, 1952 (S.I. 1952 No. 2207, as amended by S.I. 1955 No. 967), makes provision for payment of subsidy on calves born up to and including October 29, 1955. For this purpose an animal ceases to be a calf when it cuts its first permanent incisor tooth. Subject to parliamentary approval (since every scheme requires the affirmative resolution of both Houses of Parliament) the Government has decided to continue provision for the subsidy so that it will apply to calves born up to and including October 29, 1958. From April 1, 1955, the subsidy has been payable at the rate of £7 10s. for each calf except a heifer calf of the Jersey, Guernsey, Friesian or Ayrshire breeds which has been reasonably well reared, is suitable for further rearing for beef production, or, if a heifer calf, for use for breeding for beef production. The White Paper (Cmd. 9721) announcing the Government's conclusions following the annual review of farm prices in 1956, mentioned above, declares (para. 32) that "in accordance with the policy of encouraging beef production, the rate of calf subsidy will be increased to £8 10s. in respect of steer calves born on or after April 1, 1956."

(E) Hill Cattle, Hill Cow and Hill Sheep Subsidies

By the Hill Farming and Livestock Rearing Acts, 1946 to 1954, referred to earlier in this article *ante*, p. 218, provision is made for payment of subsidy on hill cattle, hill cows and hill sheep. This provision is due to expire in November, 1956, but, as already explained, the Minister of Agriculture announced in the House of Commons on March 15, 1956, the intention of the Government

to introduce legislation extending the period of the operation of the Acts in question by a further seven years.

Several schemes have been made under this provision from time to time for payment of subsidy. At present (1956) the rate of subsidy for hill cattle (grazed day and night on hill land for not less than sixteen weeks during the period from mid-April to mid-November) is £2 per head. The applicant may be required to use up to 60 per cent. of the subsidy in improving the land.

The Hill Cow Subsidy at present in force amounts to £10 per head and may be paid on cows and in-calf heifers in regular breeding herds on livestock rearing land throughout the year. The applicant may be required to use up to 40 per cent. of the subsidy in improving the land.

Where the same cattle qualify for subsidy payments under both the Hill Cattle and Hill Cow Schemes not more than £10 will be payable on any one animal.

Hill Sheep Subsidy is payable in 1956 under the provisions of S.I. 1956 No. 456, at the rate of 5s. for each breeding ewe of an approved pure hill breed, and 2s. 6d. in the case of sheep of certain other breeds. The conditions of eligibility for payment are prescribed by the Hill Sheep (England and Wales) Scheme, 1955 (S.I. 1955 No. 679).

(F) Marginal Production Scheme

Under the Agriculture Act, 1947, s. 103, provision is made enabling the Minister of Agriculture to make schemes for providing goods and services to persons managing or farming agricultural land. This power has been exercised and there is at present in operation the Agricultural Goods and Services Scheme (England and Wales) Order, 1956. This Order consolidates earlier orders which together constitute the Agricultural Goods and Services Scheme and sets out in detail the rules prescribed concerning the persons to whom goods and services may be supplied, and the goods and services which are the subject of the scheme.

A further scheme called the Marginal Production Scheme has however been made under this provision, which enables goods and services to be provided by or at the expense of the Minister of Agriculture at less than the full cost. The applicant for this form of financial assistance has to prepare in consultation with the County Agricultural Executive Committee a programme of work which will increase or maintain production on the farm but which could not be expected to pay its way at first, even with such Government grants as may be available. Broadly, the scheme covers two types of work:—

(a) Programmes of work calling for so heavy an investment of capital that a return could not be shown in a reasonable time. This might include bush clearing and reclaiming derelict land including derelict woodland and unproductive orchards; claying and marling; drainage; ditching, fencing; repairing roads; installing cattle grids, etc.

(b) Programmes of work not calling for heavy capital investment but including ploughing and cultivation, drilling, constructing silos, etc. This type of programme is accepted only from marginal producers, *i.e.*, those farmers whose costs are high because their farms are, for example, remote, naturally infertile or difficult to work, and who therefore have little margin of profit to plough back in improvements.

The rate of grant hitherto paid under the Marginal Production Scheme has been 50 per cent. of the approved cost of the work sanctioned by the County Agricultural Executive Committee. The White Paper (Cmd. 9721) already referred to above, however, declares (para. 32) that "the maximum rate of grant under the marginal production schemes will also be increased so far as work on marginal farms is concerned . . ." *i.e.*, the second class of case above-mentioned.

(G) Other Grants

Other forms of assistance available in respect of the farming of agricultural land include grants towards the cost of eradication of bracken; towards the cost of removal of scrub in connection with a rabbit clearance project; towards the cost of purchase by a farmers' society of a bull or boar; and towards the construction of silos to encourage greater reliance upon home grown animal feeding stuffs.

It is scarcely necessary or appropriate to give details here of these grants, but full information about them can readily be obtained by any farming owner or occupier interested, or by his advisers, from the Agricultural Executive Committee of the county concerned.

Grants are also provided by the Forestry Commission to encourage land owners to plant or replant woodlands. A small wood planting grant of £17 an acre may be paid by the Forestry Commission; and a similar grant is payable in respect of woods dedicated under a scheme operated by the Commission. There is also an "approved woodlands scheme" under which a grant of £8 10s. an acre may be paid.

Grants may also be paid on an acreage basis for the clearance of scrub in preparation for planting, and a block planting grant is payable in respect of poplars, amounting to £8 10s. per acre, or 2s. for each tree if planted in lines of one hundred or more trees.

Full details of these grants may be obtained from the Forestry Commission.

THE VALUE OF A SEARCH CERTIFICATE

By A. G. Robinson, m.a., Solicitor

The precise value and effect of a certificate of official search in the Land Charges Registry showing no subsisting entries are not always easy to assess, particularly where questions of priority between competing registrable interests are involved. A detailed consideration of this subject may assist those for whom searching has become a matter of routine to recall exactly how far a clear search certificate can be regarded as a *carte blanche* and, incidentally, the circumstances in which a priority notice is essential.

A certificate of official search is conclusive according to the tenor thereof in favour of a " purchaser " or an intending " purchaser " (Land Charges Act, 1925, s. 17 (3)). " Purchaser " means any person, including a mortgagee or lessee, who for valuable consideration takes any interest in " land " or in a charge on " land " (*ibid.*, s. 20). " Land " is very widely defined in the same section. Thus, even if there is in fact a subsisting entry on the register, such a purchaser, if he receives a clear certificate of search, may take priority over the persons interested under or in respect of the matter or document which is the subject of the entry. Subsections (7), (8) and (9) of section 13 of the Act provide that solicitors and trustees who have obtained such a certificate shall not be answerable in respect of any loss that may arise from error in the certificate. In view of section 17 (3), it is difficult to see how such loss could be suffered by anyone unless he happened not to be a purchaser or intending purchaser as previously defined.

These provisions show how inadvisable it is, by making a personal search, to forgo the advantage of holding a conclusive certificate. A purchaser who made a personal search for judgments and failed in the course of his search to discover an incumbrance that was in fact registered was held nevertheless to have notice of it (*Proctor* v. *Cooper* (1855) 2 Drew 1). A further objection to a personal search by a purchaser is that he may be affected by entries made on the register between the date of the search and the date of completion of his purchase, whereas a certificate provides the limited protection in this respect mentioned later.

In connection with the conclusiveness of a certificate of search, there is, unfortunately, no particular statutory remedy against the

Land Charges Registry available to a person who has duly registered a land charge which, through a mistake of the Registry staff, is not disclosed on a search certificate and is consequently overridden by a purchaser (*a*). The Land Charges Registry staff are, however, made expressly liable to criminal proceedings for dishonest practices or wilful negligence in connection with certificates of search (*ibid.*, s. 17 (5)).

When the Land Charges Act, 1925, was enacted it was assumed that the person who obtained a certificate of search would complete his purchase on the same day; and for a clear understanding of this subject it is desirable first to consider the effect of the Act when that assumption is made. Various sections of the Act provide that unregistered annuities (in so far as registrable), writs and orders (except receiving orders in bankruptcy), deeds of arrangement, land charges classes A and B, puisne mortgages, limited owner's charges and general equitable charges are void against a purchaser as previously defined who completes after the incumbrance was created. Unregistered estate contracts, charges for death duties, restrictive covenants and equitable easements are void against such a purchaser but only if he is a purchaser of a legal estate in the land for money or money's worth. All the before-mentioned unregistered incumbrances are void against a purchaser notwithstanding that he had other notice of them. An unregistered pending action does not bind a purchaser unless he has express notice of it; and an unregistered bankruptcy petition is void only against a purchaser of a legal estate in good faith, for money or money's worth, and without notice of an available act of bankruptcy. In light of the conclusiveness of a search certificate, it follows that for these purposes an "unregistered" incumbrance is one not disclosed on the purchaser's certificate. It should be observed that it was of no significance that the incumbrance might have been created with the benefit of a clear certificate of search in favour of the incumbrancer. Before the Law of Property (Amendment) Act, 1926, a certificate of search did not confer upon the searcher any priority over other transactions completed after the date of his certificate. Its value was in respect of transactions completed prior to the date of the certificate only.

At this stage an example may help. If a puisne mortgage of Blackacre is created on November 1 and on November 3 someone obtains a clear certificate of search against the owner of Blackacre and contracts to buy Blackacre on the same day, then he is not

(*a*) For the remedy at common law for breach of a statutory duty, see Charlesworth on *Negligence*, 2nd ed., Chap. 21.

bound by the puisne mortgage. It is of no consequence that the puisne mortgagee himself searched; nor that the puisne mortgage was in fact registered when the purchaser searched; nor that the purchaser searched again before completion and his certificate then showed the mortgage to be registered; nor that the purchaser never registered his own estate contract.

The Land Charges Act, 1925, presented the difficulty that it was not always possible to complete on the date of the search certificate, and the Act left a purchaser exposed to the risk that an incumbrance might be registered during any period that might intervene between the date of the search and the date of completion. The remedy was section 4 (2) of the Law of Property (Amendment) Act, 1926, which read:

> " Where a purchaser has obtained an official certificate of the result of search, any entry which is made in the register after the date of the certificate and before the completion of the purchase, and is not made pursuant to a priority notice entered on the register before the certificate is issued, shall not, if the purchase is completed before the expiration of the second day after the date of the certificate, affect the purchaser."

By virtue of the Land Charges Rules, 1940, and the Land Charges (No. 2) Rules, 1940, the subsection has been amended to read " before the expiration of the fourteenth day " instead of the second day. In reckoning the number of days, Sundays and other days when the Registry is not open to the public are to be excluded. Thus the present position is that the protection afforded to a purchaser by a clear search certificate no longer extends merely to registrable incumbrances created prior to the date of the certificate but also to such incumbrances created prior to the date of completion of the purchase provided that completion takes place before the expiration of the fourteenth working day after the date of the certificate. It should be observed that although a certificate of search may now confer upon a purchaser priority over incumbrances created after the date of the certificate, it still cannot confer any priority over incumbrances created within the fourteen days but after the date of completion. It is a common error to believe that a search certificate gives fourteen days' protection irrespective of the date of completion.

Thus, a purchaser who obtained a clear certificate on November 3 would not be bound by a puisne mortgage created on November 4 with the benefit of a clear certificate of search, provided that he contracts not later than the fourteenth working day after November 3. If, for example, he contracted on November 10,

it would be of no consequence to him that the puisne mortgage happened to be registered on November 5—even, it seems, if he searched again unnecessarily before the 10th and found the mortgage had by then been registered. Thus it will be seen that the estate contract made on November 10 (itself registrable) for the purchase of Blackacre, takes (by virtue of the clear search on November 3) priority over the puisne mortgage created on November 4 with the benefit of a clear search certificate and registered on November 5, notwithstanding that the estate contract is not registered until, say, November 11, or, for that matter, is never registered at all. What has destroyed the priority of the earlier incumbrance is the interval between the purchaser's search on November 3 and his contracting on November 10—during which time he is not to be affected by any entry on the register.

Therefore, as soon as, in 1926, search certificates became, as it were, forward-looking as well as backward-looking, it became essential to give a person in the position of the puisne mortgagee in my example some means of protecting his interest. Accordingly, section 4 (1) of the Law of Property (Amendment) Act, 1926, was enacted in these terms:

> "Any person intending to make an application for the registration of any contemplated charge, instrument, or other matter in pursuance of the Land Charges Act, 1925, or any rule thereunder may give a priority notice on the prescribed form at least two [now fourteen] days before the registration is to take effect and where such a notice is given—
>
> (a) the notice shall be entered in the register to which the intended application when made will relate;
>
> (b) if the application is presented within fourteen [now twenty-eight] days thereafter and refers in the prescribed manner to the notice, the registration shall take effect as if the registration had been made at the time when the charge, instrument, or matter was created, entered into, made, or arose, and the date at which the registration so takes effect shall be deemed to be the date of registration. . . ."

Returning to my example, if the puisne mortgagee had duly given a priority notice the purchaser's search certificate on November 3 would not avail him because a reference to section 4 (2) of the 1926 Act (quoted *supra*) shows that the forward-looking protection afforded by a search certificate is expressly excluded where a registration after the date of the certificate is "made pursuant to a priority notice entered on the register before the certificate is issued. . . ." Nor is the purchaser, in fact, prejudiced

by the priority notice because its registration will be revealed on his search certificate. It is interesting, however, to observe that if the existence of the priority notice is, through mistake by the Registry staff, not revealed on the purchaser's search certificate, the certificate is not, in this context, conclusive. Although section 17 (3) of the Land Charges Act, 1925, makes a search certificate conclusive, it is only conclusive " as against persons interested . . . in respect of matters . . . whereof entries are required or allowed as aforesaid . . . " *i.e.*, matters registrable under the Act of 1925. Priority notices are registrable under the Act of 1926.

It is fairly obvious why a priority notice must be given at least fourteen days before the ultimate registration is to take effect (*i.e.*, the day of creation of the land charge). In my example, if the puisne mortgagee gave his priority notice less than fourteen days before its creation—say, on October 30—the subsequent purchaser might have searched on October 29 with a view to contracting on November 10, and having obtained a clear search certificate he is not to be affected by anything (including a priority notice) registered between October 29 and November 10. Therefore a priority notice given on October 30 must be ineffective against him. In short, one must give a priority notice early enough to be revealed on a search certificate made by a person who happens to complete a subsequent incumbrance immediately after one's own and on the fourteenth working day after his search.

The significance of the twenty-eight days in section 4 (i) (b) of the 1926 Act (as amended) can be shown by a further reference to my example. If the puisne mortgagee had lodged a priority notice on, say, October 15, he would have had up to twenty-eight days thereafter in which to register the mortgage he created on November 4. Thus, he might have delayed registration until November 11, and although registered after the date of the contract, the purchaser is bound by the mortgage because it is, by virtue of section 4 (i) (b), deemed to have been registered on the day it was created—*i.e.*, November 4.

It is commonly said that priority notices were introduced to meet the difficulty of registering restrictive covenants entered into on a sale in time to affect a mortgagee from the purchaser when he creates a mortgage immediately after completion of his purchase. In fact, as the previous discussion shows, priority notices are of much wider application and ought always to be lodged by anyone who proposes to take a registrable interest in land.

The examples so far adopted in this article have shown the extent to which a clear search certificate may protect a person who

contracts to buy land against an earlier puisne mortgage. The position would have been the same if the earlier incumbrance had been, for example, a limited owner's charge or a general equitable charge; but there is a class of incumbrances, namely estate contracts, charges for death duties, restrictive covenants and equitable easements, which are not void for want of registration against a person who merely contracts to buy land. These incumbrances are void for want of registration only against "a purchaser of a legal estate for money or money's worth" (Land Charges Act, 1925, s. 13 (2)). The ordinary meaning of "purchaser" might lead one to think that a man who contracts to buy a house is "a purchaser of a legal estate for money." But section 20 (8) of the Act reads: "'Purchaser' means any person . . . who . . . takes any interest in land. . . ." Thus a "purchaser" claiming the benefit of section 13 (2) must be a person who "takes" a legal estate in land; and, of course, a person who contracts to buy land only "takes" by virtue of the contract an equitable interest in the land. For this reason he cannot hope to over-reach for want of registration the class of incumbrances now being considered until he actually completes his purchase and so takes the legal estate. Therefore, although he may have contracted with a clear search, he must search again before completion because the protection afforded by the pre-contract search did not extend to (*inter alia*) this class of incumbrances.

In itself, the Land Charges Act, 1925, does not present any great difficulties in connection with the priority between competing registrable interests; but where mortgages other than with deposit of deeds are concerned, the position is complicated by section 97 of the Law of Property Act, 1925. It reads:

> "Every mortgage affecting a legal estate in land made after the commencement of this Act whether legal or equitable (not being a mortgage protected by the deposit of documents relating to the legal estate affected) shall rank according to its date of registration as a land charge pursuant to the Land Charges Act, 1925."

In certain circumstances there is a direct conflict between this section of the Law of Property Act, 1925, and section 13 (2) of the Land Charges Act, 1925. For example, on November 1 X takes a puisne mortgage of Blackacre, and on November 3 Y takes an equitable charge upon Blackacre (without deposit of deeds). X registers his pusine mortgage on November 5 and Y registers his charge on November 6. According to section 97 X's mortgage "ranks" before Y's charge by virtue of the prior registration, but according to section 13 (2) X's mortgage is "void" as against Y

(being a " purchaser ") because it was not registered before the creation of his charge. This conflict has not yet been resolved by judicial decision. On the merits of the case, section 13 (2) ought to prevail because if, for example, a year or two elapses before either mortgagee registers his interest there is little virtue in one of them, at that late stage, happening to register his interest a day before the other. Again, the general intention of the 1925 property legislation was that the system of registration of land charges should be a warning system—in fact, within the registration scheme, virtually the only warning system. Section 199 (1) of the Law of Property Act, 1925, provides:

> " A purchaser shall not be prejudicially affected by notice of . . . any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925, . . . which is void or not enforceable as against him under that Act . . . by reason of the non-registration thereof. . . ."

One would expect, therefore, that if a mortgagee completes his mortgage without warning by registration of an earlier registrable mortgage, he should have priority. Certainly he would have priority if his mortgage were with deposit of deeds, and it is strange that section 97 may deprive him of priority simply because his own mortgage is itself registrable and is not afterwards registered before the other mortgage. It appears that section 97 is out of line with the general registration scheme and is to some extent an aberration.

In the light of these considerations it is probable that when the question arises for judicial decision, the court will be disposed to accept the technical argument that the Land Charges Act, 1925, is the later statute, and to hold that section 13 (2) must therefore prevail. Although both statutes are dated April 9, 1925, the Law of Property Act is Chapter 20 and the Land Charges Act is Chapter 22.

When one comes to look at section 97 in connection with the forward protection provided by a clear search certificate by virtue of section 2 (2) of the Law of Property (Amendment) Act, 1926 (quoted *supra*), it is seen to create still further difficulties. Suppose, for example, that X takes a puisne mortgage on November 1, Y obtains a clear certificate of search on November 3, X registers his puisne mortgage on November 4, Y takes a puisne mortgage on November 5 and registers it on November 6. By section 97 X ranks before Y by prior registration, but by section 2 (2) of the Act of 1926, Y's clear search certificate on the 3rd means that X's entry in the register on the 4th is not to " affect " Y. Again there is a direct conflict because Y is clearly " affected " by X's entry if it has the effect of making X's mortgage " rank " before Y's.

Section 97 is bound to cast some doubt upon the value of a clear search certificate in the hands of a person intending to take a mortgage which is itself registrable, but there are two statutes subsequent to the Law of Property Act, 1925, which are at loggerheads with section 97, and there seems to be little likelihood that this anomalous section, which purports to put registrable mortgages outside the general priority scheme for no very obvious reason, can stand against them.

The point of most practical importance to emerge from this lengthy and perhaps tedious examination of the value of a clear search certificate is that it can create a period of up to fourteen days during which no entry on the register may affect the holder of the certificate; and therefore there is a largely unsuspected necessity for anyone intending to take a registrable interest in land of any kind always to lodge a priority notice if he wishes to be certain of not being over-reached by a subsequent incumbrancer or purchaser.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Milner v. *Staffordshire Congregational Union (Incorporated)* [1956] 2 W.L.R. 556; [1956] 1 All E.R. 494 (Ch.D.)

Sale of charity land—consent of Charity Commissioners—whether required at contract or conveyance—Charitable Trusts Amendment Act, 1855, s. 29.—The Charitable Trusts Amendment Act, 1855, s. 29 provides (so far as relevant): " . . . It shall not be lawful for the trustees . . . of any charity to make . . . otherwise than . . . according to a scheme legally established or with the approval of the Board [*i.e.*, the Charity Commissioners] any sale . . . of the charity estate . . ."

The defendants, an incorporated charity, in September, 1954, contracted without such consent or mention thereof (and without legal advice) to sell freehold land to the plaintiff; shortly afterwards, the defendant's solicitors informed the plaintiff that consent would be needed and it was obtained in November, 1954. However, in October, the plaintiff, objecting to the public advertisement by the Commissioners, had repudiated the contract. Danckwerts J. held that the word " sale " in section 29 above meant a contract and not merely a conveyance, so the trustees had contravened the statute; " a contract to sell the charitable property without the consent of the Charity Commissioners is not lawful. As it is not lawful it is not enforceable " ([1956] 2 W.L.R. at p. 561; [1956] 1 All E.R. at p. 498). The learned judge distinguished a reference to " alienation of charity estates by way of sale " in *Re Mason's Orphanage and London & North Western Railway Co.* [1896] 1 Ch. 54 at p. 61 *per* Stirling J. on the ground that the only point there decided was that the documents setting up the charity did not amount to a " scheme legally established " within the statute. The case arose after contract on a vendor and purchaser summons, and both Stirling J. and the Court of Appeal ([1896] 1 Ch. 596) appear to have regarded the contract as valid provided the vendor deduced a good title. It is submitted with respect, that it would have been preferable and more consistent with *Re Mason's Orphanage, supra,* to hold the requirement of consent merely a matter of the vendor's title. Then the question in the present case would have been whether the purchaser was entitled to repudiate and if he had done so promptly—see, for example, *Elliot* v. *Piersen* [1948] Ch. 452; *Re Spencer and Hauser's Contract* [1928] Ch. 598; *Re Hailes and Hutchinson's Contract* [1920] 1 Ch. 233. It should be noted, however, that Danckwerts J. reserved his view about a contract made conditional on the obtaining of consent.

It is now necessary and would in any event be normal and desirable

to obtain consent before contract. The Charity Commissioners must be satisfied that the sale is advantageous to the charity (Charitable Trusts Act, 1853, s. 24). Their requirements include survey, the payment of the charity's costs by the purchaser and advertisement of the intended price with an invitation for higher offers, or the fixing of a reserve price if the sale is by auction (see 3 *Encyclopedia of Terms and Precedents,* pp. 61 *et seq.* and the forms issued by the Charity Commission). The Committee on the Law and Practice on Charitable Trusts, after initial doubts, approved this procedure as designed to secure the best price (Cmd. 8710, paras. 249, 250). The Committee added that the procedure should be more widely publicised, especially to trustees of small charities—a point amply illustrated by the decision under discussion.

Lynch v. *Thorne* [1956] 1 W.L.R. 303;
[1956] 1 All E.R. 744 (C.A.)

Sale of Land—house to be built by vendor to express specification —no implied warranty of fitness.—The general rule is that the vendor or lessor of land with a house on it gives no warranty that it is fit for any purpose, including habitation (*e.g., Hart* v. *Windsor* (1844) 12 M. & W. 68; *Bottomley* v. *Bannister* [1932] 1 K.B. 458; as to legal defects, see *Edler* v. *Auerbach* [1950] 1 K.B. 359). Exceptionally, a warranty of fitness for human habitation is implied on the letting of a furnished house or flat (*Smith* v. *Marrable* (1843) 11 M. & W. 5) and under the Housing Act, 1936, s. 2 (*e.g. McCarrick* v. *Liverpool Corporation* [1947] A.C. 219). A different rule (sometimes treated as a third exception) applies where the vendor also contracts to build or complete a house on the land sold; there is then an implied undertaking that the work will be properly done and the house fit for habitation (*Perry* v. *Sharon Development Co. Ltd.* [1937] 4 All E.R. 390).

The Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.) has now held that the latter warranty cannot normally be implied where the contract specifies the methods and details of building, following the general rule that express terms exclude implied terms about the same subject-matter (*Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108; *Perry* v. *Sharon Development Co. Ltd., supra*). The contract for the sale by the defendant, a builder, to the plaintiff of a partially built house contained detailed specifications which provided, *inter alia,* for a nine-inch solid brick wall of particular bricks and cement. This proved inadequate to keep out rain, because of its exposed position; expert evidence showed a cavity wall to be necessary. Nevertheless the plaintiff could not recover damages because the defendant had built the wall properly and skilfully according to the specification.

In transactions of this sort a vendor is likely to extol verbally the merits of the houses he is building, and if so it might be possible to allege the existence of an express warranty overriding the subsequent written contract, as in *Couchman* v. *Hill* [1947] K.B. 554 and *Curtis*

v. *Chemical Cleaning and Dyeing Co. Ltd.* [1951] 1 K.B. 805, though those cases were concerned with express exemptions from liability. Again, if the defect is discovered before completion there might be rescission for innocent misrepresentation. Where possible an express warranty of fitness for habitation should be inserted.

Philips v. *Ward* [1956] 1 W.L.R. 471;
[1956] 1 All E.R. 874 (C.A.)

Negligent survey of land—measure of damages.—The plaintiff, on the advice of the defendant, a surveyor, purchased a house and grounds for £25,000. Unfortunately the defendant negligently failed to observe that the roof was in a very bad state of repair. In an action for damages the Official Referee found that the necessary repairs would cost £7,000, but that nevertheless the true value of the property at the date of purchase was £21,000. He therefore awarded £4,000 damages. The Court of Appeal (Denning, Morris and Romer L.JJ.) affirmed this decision after reserving judgment. The measure of damages was the loss suffered by the plaintiff; this was £4,000 because if properly advised the plaintiff would have had the choice of withdrawing or purchasing at £21,000, and in this latter event would have acquired property which could have been resold for the same figure (Romer L.J. remarked that the expenses of resale might have been recoverable if incurred [1956] 1 W.L.R. at p. 478; [1956] 1 All E.R. at p. 879). To give the plaintiff £7,000 damages would in effect give him, for £18,000, property worth £21,000.

The controlling factor here was the finding of fact that the true value was £21,000, despite the need to spend £7,000. Thereafter the calculations are logical. It is of course a common experience to find that a newly purchased house needs something spent on it; a purchase price is usually a compromise between the views of the vendor and purchaser.

The Court of Appeal also held without hesitation that all calculations should be made on values in 1952, the date of purchase, and not on the higher figures prevailing by the time of the hearing.

Goody v. *Baring* [1956] 1 W.L.R. 448;
[1956] 2 All E.R. 11 (Ch.D.)

Sale of Land—inquiries as to standard and recoverable rent—solicitor's duty to client—solicitor acting for both parties.—The defendant, a solicitor, acted for both parties on the sale of a leasehold dwelling-house, two floors of which were separately let on tenancies subject to the Rent Restriction Acts. He ascertained from the vendor that each rent had been 25s. per week since the vendor's purchase in 1948. The defendant made no further inquiries but gave this

information to the purchaser (the plaintiff) referring to the possibility of increases—because of increased rates—but without mentioning the further possibility of overpayments. When the plaintiff, after completion, sought to raise the rents, the tenants fairly readily proved that the recoverable rents were 17s. 6d. and 18s. 6d. respectively, and the plaintiff had to make repayment.

Danckwerts J. held (1) the standard of skill and care required from the defendant was that to be normally expected of solicitors, citing *Simmons* v. *Pennington & Son* [1955] 1 All E.R. 240. (2) the defendant had been negligent (a) in not making further inquiries about standard and recoverable rents from the vendor or the tenants (referring to *Hunt* v. *Luck* [1902] 1 Ch. 428), and (b) in not warning the plaintiff that on the information available the rents might be liable to reduction as well as increase; (3) that he (the judge) was at liberty to reject evidence from solicitors as to conveyancing practice and rely upon his own experience and the decided cases. He said " it is, in my view, no excuse for failure that inquiries may be troublesome to make. Neglect to make the inquiries may often result in no adverse claim; but when trouble occurs it does not seem to me to be sufficient answer to say that a chance is often taken by those whose duty it is to investigate " ([1956] 1 W.L.R. at p. 454; [1956] 2 All E.R. at p. 15) and (4) that where there have been preliminary inquiries before contract a purchaser's solicitor must still make the appropriate requisitions " even if it is only necessary to ask whether the answers thus received [*i.e.*, to the preliminary inquiries] are still complete and accurate ([1956] 1 W.L.R. at p. 456; [1956] 2 All E.R. at p. 17).

The inquiries made in this case seem to have fallen short of those advised in conveyancing textbooks—see Emmett on *Title*, 15th ed., Vol. I, pp. 31, 33 and 14th ed. Vol. II, pp. 839–844; Risdon and Hancock, *Modern Conveyancing Precedents, Practice and Law* at pp. 100, 105.

It should be noted however that Danckwerts J. criticised Q 1 (A) of the commonly used printed form of " Inquiries before Contract " (used by the defendant) as requiring too little information. The questions suggested in Risdon and Hancock, *supra*, are more extensive.

The present decision, like *Lake* v. *Busby* [1949] 2 All E.R. 964 emphasises that a solicitor's duty goes beyond the mere investigation of title, and requires him ascertain and inform the purchaser of statutory restrictions on the use of land.

Though it does not appear from the report that the negligence was occasioned by conflict of duty, Danckwerts J. also criticised strongly the practice of solicitors acting for both parties ([1956] 1 W.L.R. at p. 452; [1956] 2 All E.R. pp. 12, 13). This point, hardly appropriate for discussion in a case note, is the subject of editorial comment (*ante*, p. 180).

Peter Long & Partner v. *Burns* [1956] 1 W.L.R. 413; [1956] 2 All E.R. 25 (Q.B.D.)

Estate Agent—Commission payable on " binding contract "—innocent misrepresentation—rescission of contract—whether commission

chargeable.—The circumstances in which estate agents may be entitled to commission from a proposed vendor of land have frequently been before the courts in recent years. The law now is, said Lord Goddard C.J. in the present case "that, if no special condition is imported, the agent is only entitled to his commission if the transaction really goes through and the money is received by the vendor." ([1956] 1 W.L.R. at p. 418; [1956] 2 All E.R. at p. 27; see also the more extensive statement by Jenkins L.J. in *Midgley Estates Ltd.* v. *Hand* [1952] 2 Q.B. 432 at p. 435, and for the earlier cases *Dennis Reed Ltd.* v. *Goody* [1950] 2 K.B. 277). Here the defendant agreed to pay the plaintiffs commission "upon your introducing a purchaser ready, willing and able to enter into a binding contract to purchase." A contract was signed but the purchaser was able to rescind on the ground of innocent misrepresentation as to the effect of a town planning scheme. Lord Goddard C.J. held that a contract could not be described as binding unless it was enforceable and that consequently no commission was payable. He added that contracts for the sale of land can rarely be shown to be enforceable before completion, as investigation of title may show that completion cannot be insisted upon. *Midgley Estates Ltd.* v. *Hand, supra,* where the words "binding contract" were also used, was distinguished because it proceeded on the basis of a contract enforceable against a purchaser who had failed to find the purchase money, but was not merely a man of straw.

British Transport Commission v. *Westmorland County Council; British Transport Commission* v. *Worcestershire County Council* [1956] 2 W.L.R. 1022; [1956] 2 All E.R. 129 (C.A.)

Public Right of Way—dedication—powers of statutory body—compatibility with purposes of acquisition.—The Court of Appeal (Singleton, Jenkins and Hodson L.JJ.) has affirmed the decision of the Divisional Court (noted, *ante,* Vol. 20, p. 162) on the same ground —that nothing makes the dedication or creation of an easement or public right of way *ultra vires* so long as it is not inconsistent with the statutory purposes for which the company was incorporated. The judgments, especially that of Singleton L.J., contain a further review of the cases relied on by the Divisional Court (*ante,* p. 162), to which should be added *South Eastern Railway Company* v. *Warr* [1912] 2 Ch. 110.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Boston's (Lord) Will Trusts [1956] 2 W.L.R. 700; [1956] 1 All E.R. 593 (Ch.D.)

Trust for sale—powers of trustees—improvements—payment from capital or income—Settled Land Act, 1925, ss. 73, 75, 83; *Agricultural*

Holdings Act, 1948, ss. 81, 96.—Trustees for sale here asked the court to what extent, and upon what principles, they should exercise the discretion to pay for running repairs out of income, vested in them by the combined effect of the Settled Land Act, 1925, and the Agricultural Holdings Act, 1948. (See *Re Duke of Northumberland* [1951] Ch. 202; *Re Wynn* [1955] 1 W.L.R. 940; [1955] 2 All E.R. 865, noted, *ante,* Vol. 19, p. 390, where the relevant sections are summarised.) Vaisey J., following *Re Wynn, supra,* held that trustees for sale have a duty to conserve capital and so must exercise their discretion in the interests of all parties entitled under the settlement; in doing so, however, they were entitled to consider personal matters, such as comparative wealth or poverty, or benefits that a beneficiary might have conferred on the settled property ([1956] 2 W.L.R. at p. 706; [1956] 1 All E.R. at p. 597). The learned judge also considered and distinguished the position of a tenant for life under the Settled Land Act, whose fiduciary position (as a trustee of his powers—S.L.A. s. 107) he held to be necessarily qualified by his being also a beneficiary so that he could legitimately have regard for his own interests and tastes. " . . . the legislature of 1948 . . . was giving a privilege to the tenant for life which he could exercise for his own benefit if he chose. Where, however, that privilege and the duty of controlling it are vested in the same persons [*i.e.*, trustees for sale] the position is surely different " ([1956] 2 W.L.R. at p. 706; [1956] 1 All E.R. at pp. 596–597).

The conclusion here reached confirms, it is thought, earlier decisions (see note to *Re Wynn, supra, ante,* Vol. 19, p. 390). Yet the contrast drawn in the judgment between the duties of a beneficiary and a mere trustee suggests some problems. Is the position different if a tenant for life under the Settled Land Act is also a trustee of the settlement or, alternatively, if a trustee for sale has also the life interest? Is the position affected if trustees for sale delegate or are compelled to delegate the powers of leasing and management to the life tenant (Law of Property Act, 1925, ss. 29, 30)? One may hazard and hope that a negative answer is correct in each instance.

Re Dicey (deceased) [1956] 2 W.L.R. 996; [1956] 2 All E.R. 74 (Ch.D.)

Election—gift to plaintiff of property in which testatrix had life interest only—defendant entitled to half in remainder—gift of residue to defendant.—This case is a classic example of the operation of the equitable doctrine of election. A testatrix by her will devised " my two houses in Beresford Road, Walthamstow " to the plaintiff and also gave another house and the residue of her estate to the defendant. She was, however, entitled only to a life interest in the two houses in Beresford Road, which were thereafter held as to one half for the defendant, as to one quarter for the plaintiff, and as to the other quarter for the plaintiff's brother, in each case absolutely. Danckwerts J. held (1) though the expression " my " was inappropriate the words quoted above clearly identified the

property of which the testatrix was trying to dispose, (2) though the defendant could not give full effect to the will he could nevertheless dispose of his half share to the plaintiff, and the doctrine of election required no more (referring to *Re Booth* [1906] 2 Ch. 321 and *Re Ogilvie* [1918] 1 Ch. 492) and (3) consequently the defendant was put to his election. He could take under the will and give his half share in the houses to the plaintiff; or he could take against the will and compensate the plaintiff out of the other benefits he (the defendant) received under the will, to a maximum determined by the value of either the half share or of the other benefits, whichever was the smaller.

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3. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Smith v. *East Elloe R.D.C.* [1956] 2 W.L.R. 888; [1956] 1 All E.R. 885.*

Compulsory purchase order—Mala fides—Jurisdiction of court —Time limit.—In this case the House of Lords held (by three to two) that the time limit of six weeks for challenging the validity of compulsory purchase orders (Acquisition of Land Act, 1946, Sched. I, para. 16) prevented a challenge, after that time, on the ground that the order had been made in bad faith. One would like to say "held finally," but the experience of generations of litigation shows that decisions on this sort of point are never final; sooner or later someone is aggrieved enough to take a case to the Lords again. The House also held, unanimously, that Sched. I, para. 16 of the Act is not confined to cases falling within Part III of the Schedule (that is, cases in which special procedure is required). Three out of five of their Lordships also took the view that para. 15 of the Schedule (which is the provision allowing challenge of the order within six weeks) does not extend to challenge on the ground that the order was made in bad faith; but since two of this three formed part of the minority on the first point it would be wrong to conclude that there is no way of challenging such an order on this ground. Unless someone gives us a set of foolproof rules for determining just how to count heads in the House of Lords and work out just which propositions their decisions do support, we must regard this third question as one to be settled next time.

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* *Cf.* (1955) 19 *Conveyancer* 313.

4. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Sidney Bolsom Investment Trust Ltd. v. *E. Karmios and Co. (London) Ltd.* [1956] 2 W.L.R. 625; [1956] 1 All E.R. 536

Landlord and Tenant Act, 1954—*tenant's request for new tenancy —validity—"upon the terms of the current tenancy"—duration of tenancy—mistake in request—estoppel—failure of tenants to apply to court in time.*—This case is a curious and interesting one, not only because it shows how tenants can worsen their position under Part II of the Landlord and Tenant Act, 1954, in the attempt to improve it, but also because it presents the odd spectacle of the tenants' trying to establish that a request for a new tenancy made by them was invalid, and the landlords' trying to establish that a request to which they had taken formal objection as being bad in form was in fact all right. The case concerned a tenancy of shop premises within the protection of Part II. The tenants made a request for a new tenancy in the prescribed form. No specific mention was made of the duration of the tenancy required, but the request stated generally that the new tenancy was to be "upon the terms of the current tenancy." The current tenancy was for a term of seven years. The tenants later stated in a letter that they had intended to ask for a term of fourteen years. The landlords gave notice that they would oppose an application to the court on the ground, *inter alia,* that no valid request for a new tenancy had been made in the prescribed form. The tenants made no application to the court and took no other step but remained in possession after the expiration of their current lease. The landlords brought an action for possession. It was held by the Court of Appeal: (a) that a tenant's request for a new tenancy under section 26 (3) must indicate the duration of the tenancy requested, but in the present case the request had complied with this requirement, since by implication a new seven-year tenancy had been requested; (b) that parol evidence was not admissible to establish that a seven-year tenancy had been asked for by mistake, and that the tenants had intended to ask for fourteen years; (c) that the landlords were not estopped by their formal objection to the validity of the request from later contending that the request was valid, since the landlords' notice of opposition did not invite the tenants to refrain from applying to the county court, being simply a notification that the landlords would take that point for what it was worth in the event of legal proceedings being brought; (d) that as the tenants had not applied to the court for a new tenancy within four months of the request, as required by section 29 (3), they were precluded from making such an application, and the tenancy consequently came to an end on the date immediately before that specified in the request for the beginning of the new tenancy (s. 26 (5)). The practical lesson to be learnt from this case is that care should be taken to specify in the request for a new tenancy the duration of the new tenancy required.

(Woodfall, 25th ed., Permanent Supplement, p. 17)

Bagettes Ltd. v. *G. P. Estates Ltd.* [1956] 2 W.L.R. 773; [1956] 1 All E.R. 729

Landlord and Tenant Act, 1954—*subletting of residential flats—whether tenancy protected by Part II.*—In this case the Court of Appeal affirmed the decision of Wynn-Parry J. noted in the *Conveyancer* for January-February, 1956, at p. 75, but they formulated more clearly the reason for the decision. They held that the use of the premises for the subletting of residential flats was user for the purposes of a business within Part II of the Landlord and Tenant Act, 1954, but once the tenancy of the entirety of the premises had expired, the tenants could not be said to occupy the ancillary portions (the caretaker's quarters, storerooms, common parts, etc.) for the purpose of a business carried on by them. Further, the position in regard to the vacant flats was that they were not occupied by the tenants of the entirety for the purposes of subletting, but were occupied by them only until they could exclude themselves from occupation by subletting.

(Woodfall, 25th ed., Permanent Supplement, p. 3)

Fisher v. *Taylors Furnishing Stores Ltd.* [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78

Landlord and Tenant Act, 1954—*landlord's intention to demolish and reconstruct—intention to use reconstructed premises for the landlord's own business—effect.*—This is a useful decision inasmuch as it explains away some unfortunate and misleading dicta in *Atkinson* v. *Bettison* [1955] 1 W.L.R. 1127, which were in danger of defeating the intention of section 30 (1) (f) of the Landlord and Tenant Act, 1954. The landlords relied on this paragraph in answer to their tenant's claim for a new lease. The facts were that the landlords did intend to demolish the premises in question and to rebuild with the object of occupying the rebuilt premises for their own business. The county court judge, feeling himself bound by dicta in *Atkinson* v. *Bettison* to the effect that the landlord cannot rely on section 30 (1) (f) if his primary purpose is to get possession for his own business, granted the tenant a new lease. The Court of Appeal have now pointed out that the real ground of the decision in *Atkinson* v. *Bettison* was that the proposed work was not " substantial " and have explained away the dicta about primary and secondary purposes as relating merely to tests of the genuineness of the landlord's intention to do one of the things specified in section 30 (1) (f). His intention must be real and genuine. Section 30 (1) (f) must not be used merely as a colourable device to get round the five-year qualification required by section 30 (1) (g). Provided, however, that the intention is genuine, and comes within section 30 (1) (f), it matters not that the landlord's intention is ultimately to occupy the rebuilt or reconstructed premises himself. This decision should be welcomed as checking the growth of a heresy.

(Woodfall, 25th ed., Permanent Supplement, p. 23)

Gill v. *Lewis* [1956] 2 W.L.R. 962; [1956] 1 All E.R. 844

Landlord and tenant—relief against forfeiture—arrears of rent—Part of arrears paid before judgment against one of two joint lessees—balance paid later—court's discretion.—In this case joint lessees of two dwelling-houses had a history of unsatisfactory conduct in regard to the payment of rent. This culminated in proceedings being commenced against the joint lessees for arrears of rent and possession, but one of them could not be found (in fact he was serving a prison sentenced for indecent assaults on boys committed in one of the houses) and judgment was eventually signed against the other in default of appearance. Before this judgment was signed part of the arrears was paid and the rest was paid later together with the landlords' costs. The two lessees then applied by summons for relief from forfeiture. The Court of Appeal held (a) that the judgment against one of two joint lessees was not an effective judgment, and so, for the purposes of section 212 of the Common Law Procedure Act, 1852, there had been no "trial" before the whole of the arrears and costs were paid. Hence, the lessees were entitled to have all further proceedings in the action discontinued, and, by way of corollary, an order for relief against forfeiture. The court held further, (b) that even if the judgment against the one joint tenant had been an effective judgment, the court should grant relief from forfeiture under section 46 of the Judicature Act, 1925. Such relief is granted, subject to the time limit of six months from the execution of the judgment fixed by section 210 of the Common Law Procedure Act, 1925, on payment of arrears and costs save in exceptional circumstances. None of the following circumstances could be regarded as exceptional within this proviso:— the previous history of the lessees as bad payers, their elusive habits which made it difficult to serve them with legal process, or the fact that one of them had been convicted of indecent offences in one of the dwelling-houses. An instance of the kind of circumstances which the court might regard as exceptional is to be found in *Stanhope* v. *Haworth* (1886) 3 T.L.R. 34 (C.A.); in this case relief was refused as inequitable, the landlord having been keeping up the colliery which was the subject of the application at great expense, and having agreed to re-let it to a new tenant who had incurred expense in plant and been let into possession, and the old tenant having applied for relief just before the end of the six months. Another example of a case where relief might be refused was given by Jenkins L.J., that of a tenant falling into arrears with the rent of premises which he was notoriously using as a disorderly house.

(Woodfall, 25th ed., pp. 1019–1020)

Treseder-Griffin v. *Co-operative Insurance Society Ltd.*
[1956] 2 W.L.R. 866; [1956] 2 All E.R. 33

"Gold clause" in lease not effective.—The majority of the Court of Appeal (Denning and Morris L.JJ.), Harman J. dissenting, have

reversed the decision of Lord Goddard C.J., noted in *Conveyancer* for January-February, 1956, at p. 74, which upheld the validity of a "gold clause" in a lease. The Court of Appeal have, in effect, declined to give effect to what must have been the object of the clause, namely, to safeguard the landlords against depreciation of the currency. The tale is not yet over, however. Leave to appeal to the House of Lords has been given. The issues involved are very suitable for determination by the highest tribunal, and the decision in the House of Lords (if, as is hoped, the litigants will be public spirited enough to allow the matter to be argued there) will be awaited with interest.

Owen v. *Gadd* [1956] 2 W.L.R. 945; [1956] 2 All E.R. 28

Covenant for quiet enjoyment in lease—scaffolding erected by landlords in front of demised shop—breach of covenant.—In this case the landlords demised a lock-up shop to the tenants for ten years, retaining for their own use premises above the shop. The lease contained a covenant for quiet enjoyment in the usual form. Soon after the grant of the lease the landlords erected scaffolding in front of the demised shop for the purpose of carrying out repairs to the upper premises. On the lessees protesting the landlords expedited the work and did what they could to minimise any interference with the access to the shop and the shop window, and the work was completed in 11 days. Nevertheless the lessees claimed that they had lost business, during a time when trade conditions would have been favourable to them if they had not suffered from the erection of the scaffolding. The county court judge held that there had been a breach of the covenant for quiet enjoyment but, in the absence of proof of specific losses, awarded the lessees 40s. damages. The Court of Appeal held (1) that although to constitute a breach of the covenant of quiet enjoyment there must be some physical interference with the enjoyment of the demised premises, it need not take the form of a physical irruption into or upon them, and that there was no principle of law to prevent the judge from deciding that the facts in the present case constituted a substantial interference with enjoyment, and (2) there was evidence to support the judge's conclusion that on the facts there was such an interference. This decision is in accordance with the principles stated in such cases as *Sanderson* v. *Berwick-upon-Tweed Corporation* (1884) 13 Q.B.D. 547, 550, 551, *Robinson* v. *Kilvert* (1889) 41 Ch.D. 88, and *Browne* v. *Flower* [1911] 1 Ch. 219, 228.

(Woodfall, 25th ed., pp. 681–682)

Mountford v. *Hodkinson* [1956] 1 W.L.R. 422; [1956] 2 All E.R. 17

Agricultural Holdings Act, 1948—*notice to quit—tenant's letter in reply—whether a good counter-notice.*—This is a decision of some

interest to those concerned with agricultural holdings. A tenant of a farm, having been served with a notice to quit by his landlord, wrote a somewhat heated letter in reply, in the course of which he said: "In reply to your notice that I received on Saturday I don't intend to go I shall appeal against it and take the matter up with the A.E.C." The Court of Appeal held, affirming the county court judge, that this letter could not be construed as a good counter-notice under section 24 (1) of the Agricultural Holdings Act, 1948, the famous subsection which brings into play the controversial security of tenure provisions of the Act. Although the court will not decide that a counter-notice is bad on a technicality, and although there is no prescribed form for such a notice, it must indicate clearly the tenant's intention to invoke section 24 (1). The tenant's letter in this case did not reveal such an intention with sufficient clearness. It is difficult to quarrel with this decision and yet the reference to the A.E.C. (*i.e.*, the County Agricultural Executive Committee) does suggest that the tenant had in mind the section 24 (1) machinery, since the Minister's functions in dealing with notices to quit cases are mostly delegated to the committees. However, the words "I shall appeal against it" were not quite apt enough, since the next step after the service of a counter-notice is for the landlord to apply to the Committee for consent.

Hammon v. *Fairbrother* [1956] 1 W.L.R. 490; [1956] 2 All E.R. 108

Agricultural Holdings Act, 1948—*notice to quit—reasons stated —effect*—s. 24 (1) *and* s. 24 (2).—Students of the Agricultural Holdings Act, 1948, will welcome this decision by Cassels J. in which, with robust common sense, he refused to be led astray by certain dicta of Denning L.J. in *Cowan* v. *Wrayford* [1953] 1 W.L.R. 1340. The landlords had served on the tenant a notice to quit, in which, rather unwisely, they had stated certain reasons why the notice had been given—rent in arrear, failure to repair, failure to carry out an agreement to reimburse the landlords for certain moneys spent on repairs. The tenants, without prejudice to the raising of any points on the notice to quit, served a counter-notice under section 24 (1), but the County Agricultural Executive Committee gave consent. The tenant did not pursue an appeal to the Agricultural Land Tribunal. Later the tenant claimed that the notice to quit was bad on the ground that, as it gave reasons, it must be regarded as a notice served under section 24 (2), but it did not comply with the provisions of that subsection. Denning L.J. in *Cowan* v. *Wrayford* had said that the notice to quit "must either be a simple notice without stating reasons at all, in which case it will operate under section 24 (1); or it must be a notice stating reasons as prescribed by subsection (2), in which case it will operate under subsection (2)." As Cassels J. rightly said the words "without stating reasons at all" were unnecessary for the decision in *Cowan* v. *Wrayford* and are in fact wrong. The point in *Cowan* v. *Wrayford* was that the notice to quit

was clearly intended to operate under section 24 (2) but failed to comply with the subsection, and it was held that the landlord could not then turn round and claim to treat it as a simple notice to quit which was not intended to operate under section 24 (2). In the present case there was nothing to show that the landlords intended to invoke section 24 (2) at all. They gave a notice to quit to which they added certain explanatory reasons, but the notice was itself clear and unambiguous. It was quite artificial to treat the notice as if given under section 24 (2) (d) and then to claim that it was ineffective because the machinery of a preliminary notice requiring certain things to be done within a specified time had not been complied with. As a matter of practice, however, it is as well to refrain from stating reasons in a notice to quit which is not intended to attract the provisions of section 24 (2).

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5. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.).)

Bambridge v. *C. I. R.* [1955] 1 W.L.R. 1329;
[1955] 3 All E.R. 812; 34 A.T.C. 281;
[1955] T.R. 295 (H.L.)

Income Tax—Transfer of assets—Associated operations

Statutory provisions: Finance Act, 1936, s. 18 (now Income Tax Act, 1952, s. 412).

The taxpayer's appeal to the House of Lords from the judgment of the Court of Appeal (noted, *ante*, Vol. 19, p. 71) was dismissed unanimously. It being common ground that there had been a transfer of assets, that the settlement was an "associated operation" and that the death of the appellant's father was not an "associated operation," the appellant nevertheless asserted that her power to enjoy the income was attributable to the death in her lifetime of her father without revoking the revocable settlement of which he had been life tenant. The House of Lords rejected this claim for the reasons given by Jenkins L.J. in the Court of Appeal cited in our previous note, namely "An interest in remainder, or, for that matter, a contingent interest, given by settlement is given by means of the settlement and not by means of the happening of the event which brings the interest into possession or, as the case may be, fulfils the contingency."

With regard to the interest under the will of her mother the appellant contended that the will was not made "in relation" to

assets forming part of the residuary estate and not mentioned specifically therein and was therefore not an "associated operation," and further that the appellant's power to enjoy the income from the shares forming part of the residuary estate was derived from the probate and not from the will itself. As to the former point it was held that on the death of the testator "the assets affected are identified and the will is an operation effected by the testator in relation to the assets so ascertained." The latter point was also rejected for probate is no part of the title of a beneficiary of the estate to enjoy its constituent parts. An executor derives his title from the will of a testator and not from any grant of probate, although such grant may, of course, be an essential item of evidence in proof of the executor's title.

Sun Life Assurance Society v. *Davidson (Inspector of Taxes)*
[1956] 2 W.L.R. 71; [1955] 3 All E.R. 552;
34 A.T.C. 290; [1955] T.R. 267 (Ch.D.)

Income Tax—Expenses of Management—Life Assurance Companies

Statutory provisions: Income Tax Act, 1918, s. 33 (1) (now Income Tax Act, 1952, s. 425).

Point: No valid distinction can be drawn between the case of a company trading in its investments and a company which purchases its investments in order to hold them as part of its fixed capital, when considering whether brokerage and stamp duty are allowable in the calculation of "expenses of management." Buying and selling investments being part of the day to day business of both classes of company, if those charges are an expense of one then they are an expense of the other. The learned judge being bound by the decision of the Court of Appeal in *Capital and National Trust Ltd.* v. *Golder* (1949) 31 T.C. 265 to hold that such expenses were not allowable to an investment company, therefore refused to hold them allowable to a life assurance company. The learned judge commented upon the said decision of the Court of Appeal and expressed himself unable to follow such reasoning as appears in the reported judgment.

Facts and Decision: Two life assurance companies paid tax on the income from their investments, as is usually the case. They claimed under Finance Act, 1938, s. 33 (1) repayment of so much of the tax paid by them as was equal to the amount of the tax on sums disbursed as brokerage and stamp duties, on the footing that these disbursements were "expenses of management."

Held: Such sums were not "expenses of management."

Anglo-French Exploration Co. Ltd. v. *Clayson* (*Inspector of Taxes*)
[1956] 1 W.L.R. 325; [1956] 1 All E.R. 762;
[1956] T.R. 37 (C.A.)

Income Tax—Trading receipt—Sum paid on termination of agency and office of secretary

Statutory provisions: Income Tax Act, 1918, Schedule D, Case I (now Income Tax Act, 1952, s. 123).

The Court of Appeal rejected the taxpayer's appeal from the judgment of Mr. Justice Harman (noted, *ante*, Vol. 20, p. 78). The Master of the Rolls, with whom the rest of the court concurred, agreed with the conclusion of the learned judge and repeated with approval the quotation from his judgment set out (*ante*, Vol. 20, p. 79) in the previous note thereon wherein he held that the money was received in the course of the trade of selling shares. However, the main argument, and certainly the greater part of the judgment, was concerned with the question of the sum paid on the termination of the agency contract apart from the concurrent share dealing. The court refused to accept that the law relating to such payments was different in England and Scotland (a point recently stressed by the same court in *Wiseburgh* v. *Domville* [1956] 1 W.L.R. 312 in a somewhat similar case). Although the agency contract cancelled was one of only eight held, each of which had been held for some time without variation, the court considered that "the concellation of the contract in no way affected the profit making apparatus of the company which retained its offices and staff in Johannesburg exactly as before." The company had thus not given up a capital asset but merely obtained a revenue receipt incident to their trade.

Maclean (*Inspector of Taxes*) v. *Trembath* [1956] 1 W.L.R. 437;
[1956] 2 All E.R. 113; [1956] T.R. 73 (Ch.D.)

Income Tax—Expenses of directors—Wife accompanying husband on business trip

Statutory provisions: Income Tax Act, 1952, ss. 161, 162 and 9th Schedule, para. 7.

Point: In ascertaining what are the duties of directors of a company, even a company in which the sole shareholders and directors are man and wife, it is necessary to look at the directions of the company. The articles of association are usually in general terms but specific directions should be found in the minutes or in directives. If such directions are given it would be necessary for the Crown to allege that they were not "bona fide" in order to rebut the evidence they provide. Family companies generally are very lax in keeping records of decisions reached, such decisions being made with less formality than in the case of the public company. Their absence may prove embarrassing when it is necessary to prove, as in this case, that "expenses" were incurred "necessarily" in the performance of the line of duty. The case stresses the distinction between

travelling expenses and other expenses for tax purposes in that the former, in order to be an allowable deduction for tax purposes, need only be incurred " necessarily " whereas the latter must be incurred " wholly exclusively and necessarily " in the performance of duties.

Facts and Decision: A husband and wife, the sole directors and shareholders of a company concerned with refrigeration, went to Australia to investigate refrigeration technique there. The husband, a full time working director, spent a considerable time during their eleven weeks' stay visiting installations and having discussions on distribution methods. His wife, who rarely attended the business premises in England and signed documents at home, accompanied her husband on only four of his business appointments whilst in Australia. There was no resolution of the company that the wife should accompany her husband nor was any direction issued to her. The husband gave evidence that he thought she should go with him for, although she had no technical knowledge, she was a good conversationalist which he was not. The Special Commissioners found that the expenses of both the husband and the wife incurred in sea passages, travel in Australia and hotel expenses were " wholly exclusively and necessarily " incurred in the performance of the duties of their respective offices. The Crown appealed, claiming in respect of the husband that the expenses incurred by him were in the acquisition of " personal equipment " in respect of his business as a dealer in refrigerators.

Held: It was open to the Special Commissioners to find as they did in the case of the husband. The wife's expenses on the other hand were incurred neither wholly exclusively nor necessarily in the performance of the duties of her office on the available evidence. Mr. Justice Roxburgh found no suggestion " as to the function she was to perform in Australia anywhere in the case " or that " any directions were given to her at all." Nor did there appear any " evidence retrospectively as to what she did in fact do for the company " but only an ill-defined business element. He pointed out that it was a fallacy to suppose that if the husband's expenses are allowable the wife's are necessarily allowable too. One *obiter dictum* of the learned judge is worth recording namely: " If a public company, acting with all proper formalities, required a director to travel to Australia for the performance of one single duty occupying but a single day, I feel no doubt that the whole of the passage money would be allowable as a deduction, notwithstanding that he spent several further months in Australia doing nothing but visiting his friends and relations " (see 1 W.L.R. at p. 446).

Heelex Investments Ltd. v. *C. I. R.* [1955] 1 W.L.R. 289;
[1955] 1 All E.R. 641; 34 A.T.C. 47;
[1955] T.R. 49 (C.A.)

Profits tax—group assessments on principal company

This decision (noted, *ante*, Vol. 19 at pp. 73 and 240) is intended to be reversed by statute as was indicated by the Chancellor of the

Exchequer in his budget statement. The *Finance (No. 2) Bill* (Bill 124) contains the intended provisions in clause 25 thereof. This provision will be further noted if such clause, or any amendment thereof, is enacted.

C. I. R. v. *Universal Grinding Wheel Co. Ltd.*
[1955] A.C. 807; [1955] 2 W.L.R. 892;
[1955] 2 All E.R. 29 (H.L.)

Profits tax—distribution

This decision (noted, *ante*, Vol. 19 at p. 241) is also intended to be reversed by statute as was indicated in the budget statement. The *Finance (No. 2) Bill* (Bill 124) contains the intended provisions in clause 26 thereof. This provision will be further noted if such clause, or any amendment thereof, is enacted.

Sanderson and Others v. *C. I. R.* [1956] 2 W.L.R. 98;
[1956] 1 All E.R. 14; [1955] T.R. 315 (H.L.)

Estate Duty—Valuation

Statutory provisions: Finance Act, 1894, ss. 2 (1) (c) and 7 (5); Finance Act, 1940, s. 55.

The House of Lords has now confirmed the decision of the Court of Appeal (noted, *ante*, Vol. 19, p. 73) that an "assets valuation" under Finance Act, 1940, s. 55 is applicable alike to shares actually passing on the death under Finance Act, 1894, s. 1, and to shares deemed to pass under Finance Act, 1894, s. 2 (1) (c), by reason of a gift within 5 years of the death. Section 55 of the Act of 1940 is merely a rider or proviso to section 7 (5) of the Act of 1894 which is the valuation section, and has no further operation than to impart a different method of valuation in certain circumstances. With the one exception of section 5 (see *Att.-Gen.* v. *Milne* [1914] A.C. 765) the Finance Act, 1894, does not distinguish in its operation between property passing and property which passes notionally.

Re Parkes' Settlement [1956] 1 W.L.R. 397;
[1956] 1 All E.R. 833; [1956] T.R. 61 (C.A.)

Estate Duty—Beneficial interest accruing or arising

Statutory provisions: Finance Act, 1894, s. 2 (1) (d); Finance Act, 1934, s. 28.

Point: In order to ascertain whether a change has taken place on the death of the deceased in the *beneficial interest* of a beneficiary under a trust and hence whether a charge to estate duty may be

made, it is correct to state that the question cannot be solved by loose references to the substance as distinct from the form of the settlement. That does not mean, however, that "it is not permissible to ascertain the true nature and effect of the rights conferred by the settlement, whatever form of words or machinery of conveyancing the draftsmen may have employed to confer them." If there is no change in the beneficial interest itself but only in the security therefor no charge to duty arises under Finance Act, 1894, s. 2 (1) (d).

Facts and Decision: The facts are set out, *ante*, Vol. 20 at pp. 80, 81. It was agreed, however, before the Court of Appeal that one half of each year's income of the trust fund could be treated as having amounted at all material times to not less than £250.

Held: (1) Confirming the judgment of Danckwerts J.: duty was payable under Finance Act, 1894, s. 2 (1) (d) in respect of the absolute interest taken by the children in the capital of the fund, a fresh interest having then arisen. Before the death of the settlor, each child had a future interest in the capital of the fund contingent on him or her surviving the settlor and uncertain as regards its amount, which depended on the number of children who might survive him. After the death of the settlor each child had an absolutely vested interest in one-fourth of the capital of the trust fund, and the future income thereon. Any deduction in respect of their interests in expectancy was precluded by Finance Act, 1934, s. 28.

(2) Reversing the judgment of Danckwerts J.: duty was not payable in respect of the annuities. During the settlor's life each daughter was entitled to receive and was in beneficial enjoyment and possession of a yearly sum of £250 in priority to all other interests, subject only to the limitation that, if the income of the settlement did not extend to £500 altogether, each daughter would *pro tanto* go short. After the death of the settlor each daughter was entitled to an annuity of £250, a fund being appropriated for that purpose and the capital of such fund might be resorted to in the case of deficiency of income to make up the said £250 each year. There was therefore no difference in the rights or beneficial interests of a daughter before and after the death, which was in each case a right in priority to all other interests to the personal enjoyment of £250 a year. Such difference as existed was as to the incidents of that right, and in particular in the security given. The Master of the Rolls stated the position in this way (at [1956] 1 W.L.R., p. 403): "During the former period the yearly sum was payable exclusively out of the income of each year and was supported by no charge on capital and by no continuing charge on income. After the settlor's death the yearly sum was charged on the corpus of a fund specially appropriated for the purpose; but in point of beneficial enjoyment there was no essential difference, in my judgment, before and after the settlor's death."

THE LIBRARY

The Public Control of Land. By J. F. Garner, ll.m., Solicitor. Sweet & Maxwell Ltd. xxiii, 196 and (index) 8 pp. (£1 15s.)

Readers familiar with the work of Mr. Garner from his articles and the small books which he has written on such subjects as "Law of Sewers and Drains" and "Local Land Charges" will know that they can expect to find in this book an accurate, concise and practical exposition of its subject-matter. This is a much more ambitious project than those which have been mentioned, and attempts to cover in less than 200 pages the whole field of what Mr. Garner calls "the multifarious powers by which government agencies of various kinds may interfere with private ownership of land." It is inevitable that some parts of the exposition may seem a little scanty. But the extraordinary feature of this book is that, not only does it contain in a small space a general outline of a great deal of the Law of Public Health, Town Planning, Housing, Highways, and Compulsory Acquisition in a handy and completely up-to-date form, but it also goes into a great deal of detail on many points likely to be of interest to those who have to advise owners, or potential owners, of property. The book should prove very valuable to students who wish to understand fully the position of the property owner today, and to practitioners as a book of reference which will answer many day-to-day problems and act as guide to the solution of many others.

J. B. S.

Phillips' Probate Practice. Fifth edition. By D. C. Sealey-Jones, ll.m., Solicitor. The Solicitors' Law Stationery Society Ltd. xlviii, 605 and (index) 48 pp. (£2 15s.)

Phillips' *Probate Practice* has for many many years been regarded as a sound practitioner's work on non-contentious probate and the editor appears to have done his task well. One passage, that dealing with foreign cases (pp. 112 to 117), seemed to be confusing, to say the least, and we very much doubt whether a practitioner who had not had a foreign case before would find sufficient information to prepare his papers properly. The passages on dependent relative revocation, revival of revoked wills and liability of sureties could do with amplification. Apart from this, so far as we have been able to judge, this edition is accurate, up-to-date and clear. Although a chapter on the inland revenue affidavit may seem, at first blush, out of place, it is not so really, for the oath, bond and affidavit are usually prepared together. There are 68 pages of forms and the usual appendices of statutes, rules and orders, etc. We have no hesitation in recommending this edition.

E. F. G.

We have also received:—

An Outline of the Law of Rating. By William Scrivens, m.a., ll.b., Barrister-at-Law, and K. F. Goodfellow, m.a., ll.b., Barrister-at-Law. Sweet & Maxwell Ltd. 19 and 147 and (index) 4 pp. (£1 2s. 6d.)

This book is based on the articles which appeared in the *Conveyancer*. It is right up to date and deals fully with the provisions of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

The Law of Contract. Fourth edition. By G. C. Cheshire, D.C.L., F.B.A., Barrister-at-Law, and C. H. S. Fifoot, M.A., F.B.A., Barrister-at-Law. Butterworth & Co. (Publishers) Ltd. lxvii, 556 and (index) 36 pp. (£2 7s. 6d.) It seems hardly credible that the first edition of *Cheshire and Fifoot* was as recent as 1945, but such is the fact. It has become the leading students' textbook on the subject and is likely to remain so for many years.

Notes on Chancery Practice. Third edition. By F. G. R. Jordan, Solicitor. Oyez Practice Notes. The Solicitors' Law Stationery Society Ltd. 108 pp. (12s. 6d.)